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Supreme Court, U.S.
FILED

08-211 AUG 15 2008

No.

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IN THE

Supreme Court of the United States

JAMES T. SMITH, JR., COUNTY EXECUTIVE, BALTIMORE COUNTY; WILLIAM J. WISEMAN, III, ZONING COMMISSIONER, BALTIMORE COUNTY; BALTIMORE COUNTY, MARYLAND, PETITIONERS

v.

AES SPARROWS POINT LNG, LLC; MID-ATLANTIC EXPRESS, LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit erred in holding that the Natural Gas Act preempts the authority of States under the Coastal Zone Management Act to prohibit natural gas terminals from being built in the Chesapeake Bay Critical Area, one of the greatest yet most vulnerable natural resources in the Nation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Smith, Wiseman, and Baltimore County respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 527 F.3d 120 (4th Cir. 2008) and is reprinted at Pet. App. 1a-14a. The District Court's opinion is reported at 539 F. Supp. 2d 788 (D. Md. 2007), and is reprinted at Pet. App. 15a-42a.

JURISDICTION

The Court of Appeals entered its judgment on May 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This case involves the intersection of two federal statutes, two Maryland statutes, and one Baltimore County ordinance. First, Section 717b(e)(1) of the Natural Gas Act ("NGA") provides:

> The Commission [Federal Energy Regulatory Commission] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG [Liquefied Natural Gas] terminal.

Second, Section 717b(d)(1) of the NGA provides:

> [N]othing in this chapter affects the rights of States under the Coastal Zone Management Act.

Third, the Coastal Zone Management Act ("CZMA") provides, as a pre-condition to the adoption of a "State management program" for a coastal zone, that the management program contain:

> A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

16 U.S.C. § 1455(d)(2)(B).

Fourth, Maryland's Critical Area Protection Program ("CAPP"), Md. Nat. Res. Code Ann. § 8-1808, provides the following authority to Maryland's 17 coastal counties:

> (a) *Local jurisdictions to implement; grants.* — (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the [Critical Area] Commission.
>
> . . . .
>
> (b) *Goals of program.* — A program shall consist of those elements which are necessary or appropriate:
> (1) To minimize adverse impacts on water quality that result from pollutants that are discharged

> from structures or conveyances or that have run off from surrounding lands;
> (2) To conserve fish, wildlife, and plant habitat; and
> (3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area . . . .

Fifth, Maryland's Coastal Facility Review Act ("CAFRA"), Md. Envir. Code Ann. § 14-506, provides:

> (c) *County action prerequisite to processing application.* — The application [for environmental permits in connection with construction of the LNG facility] shall not be processed further nor shall the analysis required be undertaken until the county government wherein the facility is proposed to be located or wherein the pipeline will terminate, has certified to the Department that all local land use classifications, including zoning, special exceptions, variances or conditional uses, necessary for the location and operation of the proposed facility have been or will be granted.

Sixth, Baltimore County's "Chesapeake Bay Critical Areas Protection" ordinance (Bill 9-07) lists prohibited uses and includes:

> A natural gas facility located onshore or in state waters that is used to receive, unload, store, transport, gasify, regasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign

country from the United States, or transported in interstate commerce by a waterborne vessel.

Section 105.C of the Baltimore County Zoning Regulations.

STATEMENT

A. Factual Background

In November of 2005, Respondents obtained an option to lease a parcel of land in an area of Baltimore County called Sparrows Point. A generation ago, industrial behemoth Bethlehem Steel Corporation operated out of Sparrows Point. The area has a population density five times greater than the average in Baltimore County.

Respondents in 2006 sought approval from FERC to construct a liquefied natural gas ("LNG") terminal in the Chesapeake Bay on the west shore of Sparrows Point, south of Dundalk, Maryland. The facility would include 1 million barrel net capacity LNG storage tanks and consist of a 1.5 billion standard cubic feet per day LNG import terminal. 71 FR 29, 941 (Notice of Intent dated May 24, 2006). Respondents will attempt to thread the needle northward to Eagle, Pennsylvania (87 miles) by way of a 28-inch-diameter natural gas pipe. This odorless gas will pass the steel mill, which houses the second-largest blast furnace in the United States. Mogel & Batra, THE NEW BALANCE OF POWER, 145 No. 6 Pub. Util. Fort. (June 6, 2007). LNG is a natural gas that has been cooled to approximately – 260 degrees Fahrenheit for shipment and storage as a liquid. The gas is therefore

compressed to 1/600th of its volume in the gaseous state. Massive ships bring it here from Europe and Africa and they hold "approximately 130,000 cubic maters of LNG, the equivalent of about 2.8 billion cubic feet of regasified LNG." Hollis, *Should We Site It Here? LNG, the Environment and Federalism*, 2 Envt'l & Energy L. & Pol'y J. 5, 7 (2007). "One shipment holds the equivalent of five percent of the gas consumed in the United States on an average day." Stoppard & Yergin, *The New Prize*, Foreign Affairs, Nov./Dec. 2003, at 107. In sum, Baltimore County would have thrust upon it tanker ships, a marine terminal and storage tanks, a trifecta in terms of risk, which include "pool fires." "These fires can burn on water and burn faster and hotter than either oil or gasoline...because pool fires cannot be extinguished, they must burn out." Hollis, 2 Envt'l & Energy L. & Pol'y J. at 23.

In response to community outrage and the opposition of elected leaders at every level of government, Baltimore County's County Council passed Bill 71-06, a precursor to Bill 9-07 at issue in this case. It prohibited LNG terminals from being located within five miles of residential areas and 500 feet of business and manufacturing districts. On January 23, 2007, the federal district court ruled Bill 71-06 was preempted by federal law. *See AES Sparrows Point LNG v. Smith*, 470 F. Supp. 2d 586 (D. Md. 2007).

On February 5, 2007, the County Council enacted Bill 9-07. *See*, Pet. App. 248a. The Bill amended the County's critical areas program regulating coastal development, adding LNG facilities to the list of prohibited uses within the Chesapeake Bay Critical Area.

B. Procedural History

Respondents filed suit in the United States District Court for the District of Maryland, asserting Bill 9-07 was preempted by the NGA.[1] Both sides moved pursuant to Rule 56. The District Court granted Baltimore County's motion for summary judgment and denied Respondents'. The court held Bill 9-07 was a legitimate exercise of local government authority under the NGA's savings clause for the "rights of States under ... the [CZMA]." *See*, Pet. App. 46a. It observed that Maryland's Critical Area law gave Baltimore County "primary responsibility" to implement its own program. *See*, Pet. App. 28a. Because the Maryland Critical Area Commission approved Baltimore County's zoning amendment, *viz.*, Bill 9-07, so as "to become part of Baltimore County's local protection program under the Critical Area Protection program," (*see*, Pet. App. 30a) the County ordinance was "within the delegated authority" of the State of Maryland and Baltimore County under the Coastal Zone Management Act." *See*, Pet. App. 31a. The Fourth Circuit reversed by published opinion, 527 F.3d 120, holding that the zoning ordinance was preempted by the NGA. *See*, Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

The petition should be granted. The stakes are enormous. There are six active LNG terminals in the United States. Because current events have made alternative energy regnant, 40 more have been

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[1] Article VI, clause 2, contains the Supremacy Clause providing federal preemption of state and local laws.

proposed to FERC. FERC, Existing and Proposed North American LNG Terminals, http://www.ferc.gov/industries/gas/indus-act/storage/horizon-stor.pdf (last visited June 30, 2008). Conflicting rulings from other Circuits are inevitable. Zoning is the quintessential local government function, and the court's ruling allowed FERC to usurp that role. Vesting FERC with authority over all land use decisions concerning LNG terminals is an extraordinary overreach and a misreading of the statutes.

The Chesapeake Bay, the largest estuary in the United States, is home to countless marine life, vast fisheries, and esteemed estuaries, drawing diverse trades and boundless aesthetic enjoyment. It has a marine ecosystem second to none but its health is precarious, caused perhaps by development, agricultural runoff, and pollution in general due to land and water-based activities. Beyond its obvious aesthetic value, the Bay provides billions in revenue to the "Delmarva" region. Failing to protect this invaluable resource is a flagrant violation of the public trust.

This case presents the Court with an opportunity to save the Chesapeake Bay. While LNG terminals might be necessary, the need is not so great that one should be erected in one of the United States' greatest natural resources. An enduring tenet of this Court's jurisprudence is that local governments are the recognized authority in establishing permissible and prohibited land uses--on the common sense rationale that localities are in the best position to determine the risks and benefits of a proposed use and that the people

most affected should have a voice. The appellate court's interpretation of the NGA improperly usurps this critical feature of federalism.

FERC cannot lawfully decide from Washington, D.C. what an acceptable land use is in Baltimore (or Los Angeles). It cannot seriously be argued that Congress gave to FERC a blank check in advance of even knowing what sites are contemplated. This federal administrative agency has no such power to desecrate the Chesapeake Bay, the will of the people in Maryland, and the safety of citizens in Baltimore County.

This Court has never ruled on 15 U.S.C. § 717b(e)(1). It has never interpreted 15 U.S.C. § 717b(d)(1). Both laws were enacted as part of the 2005 Energy Policy Act. The federal government, the state governments, and local governments need guidance. Thus, the first prong of this Court's Rule 10(c) is satisfied. The issue is not going to go away as this is "an energy-starved Nation." *New Jersey v. Delaware*, 128 S. Ct. 1410, 1439 (2008) (Scalia, J., *dissenting*). While this case is one of first impression, it presents the Court with the opportunity to protect local and state government's traditional land use authority--police powers that cannot be usurped by unelected bureaucrats in Washington, D.C. The Court has the chance to reconcile congressional action on energy with the power of local governments to regulate zoning.

I. THE DECISION BELOW CONFLICTS WITH *NEW JERSEY v. DELAWARE*, 128 S. CT. 1410 (2008).

New Jersey v. Delaware, decided by this Court just this past spring, addressed who had the power to decide upon the propriety of placing an LNG facility in the Delaware River. This Court held, "[C]onsistent with the scope of its retained police power to regulate certain riparian uses, it was within Delaware's authority to prohibit construction of the facility within its domain." 128 S. Ct. at 1427. It added, "we cannot fathom why, if Delaware could block a casino, or even a restaurant on a pier extending into its territory, it could not reject a permit for the LNG terminal described *supra*, at 1417-1418." *Id.* at 1427 n.21.

It is true, as no doubt Respondents will urge, that the case involved riparian rights. But it is undisputed that the LNG terminal proposed here is in Maryland's Chesapeake Bay Critical Area and, more precisely, in Baltimore County's portion of the critical area. Baltimore County submits the Chesapeake Bay in this case is akin to the Delaware River. Delaware's Coastal Zone Act mirrors Maryland's. *Cf. id.* at 1418 n.10 *with* Md. Nat. Res. Code Ann. § 8-1808(b). How can Delaware have the power and Maryland not?

II. THIS CASE CONFLICTS WITH *HILLSBOROUGH COUNTY, FLORIDA v. AUTOMATED MEDICAL LABORATORIES, INC.*, 471 U.S. 707 (1985).

"We start with the assumption that the historic police powers of the states were not to be superseded

by the Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough*, 471 U.S. at 715 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "The question of the relation of the States to the federal government is the cardinal question of our constitutional system." Woodrow Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (Columbia U. Press 1961). The federalist design of government in this Country is inscribed in the United States Constitution--granting federal government limited and enumerated powers, reserving all other matters to the states. Chief Justice Marshall's view is iron-clad: "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent .... That principle is now universally admitted." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The limitations on federal power "may not be mistaken, or forgotten." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

In *Hillsborough*, the Food and Drug Administration had issued regulations in 1973 for the collection of blood plasma. In 1980, Hillsborough County adopted two ordinances affecting the collection of plasma. The Court there stated the well-established presumption against preemption; *viz.*, "that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Id.* at 715. The unanimous court held the county law could stand. More recently, in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), a unanimous court held again that "the presumption against preemption is heightened 'where

federal law is said to bar state action in fields of traditional state regulation.'" *Id.* at 1013.

In this case, the "presumption against preemption" is stronger than in either *Hillsborough* or *Reigel*, given that protection of coastal resources and land use regulation are quintessential state functions. Congress passed the CZMA in 1972. The cause was noble and necessary: States were to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452. The CZMA "*require[s] States* to submit their coastal management programs to the Secretary of Commerce for review and approval." *New Jersey v. Delaware*, 128 S. Ct. at 1425 (*emphasis added*).

The Fourth Circuit ruled the Energy Policy Act of 2005, amending the NGA, took the power from Maryland and gave it to FERC. 527 F.3d at 125. In doing so, the court turned *Hillsborough* on its head. The CZMA affirmed that the job of coastal management belonged to the states. This magnifies the key phrase this court emphasizes again and again about "traditional state regulation." Regulation of land uses along coastlines is a state function, and the Energy Policy Act of 2005 did not (indeed, could not) change that. Section 717b(e)(1) provides FERC "shall have the exclusive authority to approve or deny an application for the siting ... of an LNG terminal." The Fourth Circuit held state and local governments had "no residual power to site LNG terminals." *Id.* It determined the Savings Clause in the 2005 amendment --"That 'nothing in the NGA affects the rights of States under' the CZMA"--did not encompass the Baltimore County ordinance. *Id.* at 126.

The last time this court had to deal with a Savings Clause was its 5 to 4 decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Justice Stevens' dissent was conveyed with usual concision: "This is a case about federalism." *Id.* at 887. It is particularly apt because once again it dealt with the presumption against preemption, stating "The signal virtues of this presumption are its placement of the power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that *Congress speak clearly* when exercising that power." *Id.* at 906 (*emphasis added*). Baltimore County harkens back to the italicized three words in the last sentence. Congress certainly did not speak "clearly" to the preemption issue in the 2005 amendment to the NGA. Indeed, the statute nowhere mentions the word "preempt," which Congress routinely employs to make itself clear. *See, e.g.*, P.L. 110-53 (Congress states, in implementing recommendations of the 9/11 Commission Act of 2007, "[n]othing in this section preempts ...."); P.L. 110-114 (Water Resources Development Act of 2007 provides "[n]othing in this section shall preempt ...."); P.L. 110-161 (Consolidated Appropriations Act of 2008 provides "this subtitle preempts the laws of any State ...."). Congress knew how to concisely and explicitly provide for preemption of state laws; it just did not do so in the 2005 Energy Policy Act.

And even if it had, Congress' 2005 amendment declared, "nothing affects the rights of States" under the CZMA. The word "nothing" is unambiguous. The only question that need be posed is: what are the

"rights of States" under the CZMA? The CZMA is explicit: States define "permissible land uses and water uses within the coastal zone." 16 U.S.C. § 1455(d)(2). In fact, a state's program must establish such uses or it cannot be approved. Baltimore County's zoning law, approved by the State of Maryland, did just that and is not preempted by the NGA.

Review by this Court extends well beyond the two sides here. An entire industry, and the great majority of the Nation's population (because it disproportionately inhabits on or near the two coasts) and the welfare of the Chesapeake Bay will be affected. The case is important enough to warrant the Court's time to review it and reverse the judgment[2]. The facts are straightforward and minimal, and the Court's ruling will have far-reaching effects.

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[2] In doing so, the Court can remonstrate the Fourth Circuit's ripeness dodge. The Fourth Circuit managed to rule on the merits but only by first dismissing Baltimore County's exhaustion of administrative remedies argument. 527 F.3d 120, 125 n.7. Simply put, the elaborate approval process for LNG facilities as spelled out in the NGA has yet to be undertaken by AES. FERC has yet to approve AES' proposal (and may never do so), and that agency routinely addresses preemption issues. There was no need for the Fourth Circuit to "jump the gun." Respondents' appeal was not fit for judicial review because courts must not become entangled in cases whose effects may never be "felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967). "Courts have no business adjudicating the legality of non-events." *National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982). Respondents' "claim is not ripe for adjudication...[because] it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

The 2005 amendment and its effect on the CZMA is a straightforward--but difficult--legal question. If the rush is on for natural gas, then the Court can settle the zoning uncertainties that now impact the LNG industry, FERC, and the affected population. The Valdez experience, *see Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), would appear minor should the easy-to-spot, highly visible ships carrying the liquid natural gas meet with terror, the risk of which is exacerbated by the already strained resources of the United States Coast Guard, which has lead responsibility for the tanker to get safely to port. James Lyons, "LNG Port Security," *The Washington Times* (July 21, 2008), at Commentary on A25.

CONCLUSION

Because this case presents an important issue of federal law, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-1615

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AES SPARROWS POINT LNG, LLC; MID-ATLANTIC EXPRESS, LLC,
Plaintiffs-Appellants,

v.

JAMES T. SMITH, JR., COUNTY EXECUTIVE, BALTIMORE COUNTY; WILLIAM J. WISEMAN, III, ZONING COMMISSIONER, BALTIMORE COUNTY; BALTIMORE COUNTY, MARYLAND,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:07-cv-00325-RDB).

January 30, 2008, Argued

May 19, 2008, Decided

Reversed and remanded by published opinion. Judge Shedd wrote the opinion, in which Judge O'Grady joined. Chief Judge Williams wrote a separate opinion concurring in the judgment.

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OPINION

SHEDD, Circuit Judge:

AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC (together, "AES") brought this suit against Baltimore County, Maryland, its executive, and its zoning commissioner (together, "the County") seeking a declaration that County Bill 9-07, which prohibits the siting of any liquefied natural gas ("LNG") terminal in the County's Chesapeake Bay Critical Area, is preempted by the Natural Gas Act ("NGA"). The district court granted summary judgment to the County, concluding that Bill 9-07 is saved from preemption because it "is within the delegated authority of the State of Maryland and the County under the Coastal Zone Management Act" ("CZMA") and "is enforceable as part of the State of Maryland's Coastal Management Program." J.A. 271, 284. AES now appeals. We hold that Bill 9-07 is not part of Maryland's

federally approved Coastal Zone Management Plan ("CMP"), and therefore is not saved from preemption as an exercise of Maryland's rights under the CZMA. Accordingly, we reverse the judgment of the district court and remand for further proceedings.

I

Before turning to the facts of this case, we describe briefly the relevant statutory framework. The Natural Gas Act, 15 U.S.C. §§ 717 et seq., requires a party seeking to construct an LNG terminal to first obtain authorization from the Federal Energy Regulatory Commission ("FERC"). 15 U.S.C. § 717b(a). In order to do so, applicants must comply with the NGA's requirements as well as complete FERC's extensive pre-filing process. *See* 18 C.F.R. § 157.21. FERC must then consult with the appropriate state agency on numerous state and local issues. *See* 15 U.S.C. § 717b-1(b). The NGA also contains two provisions, added in 2005, that are pertinent to this appeal. The first provides that "[FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1).[1] The second (the "Savings Clause") provides that "nothing in the [NGA] affects the rights of States under" the CZMA and two other federal statutes.[2] 15 U.S.C. § 717b(d).

The CZMA, 16 U.S.C. §§ 1451, et seq., was designed "to encourage states to develop land-use planning programs that will preserve, protect, and restore the environment of their coastal zones." *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 793 (4th Cir. 1988). To that end, the CZMA authorizes states to

create CMPs setting forth the state's "objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12). The CZMA sets forth detailed requirements that a CMP must meet in order to obtain federal approval. *See* 16 U.S.C. §§ 1454-55. Once a state's CMP is approved by the National Oceanic and Atmospheric Administration ("NOAA"),[3] the state is eligible to receive federal grants for the purpose of administering its coastal zone management programs. 16 U.S.C. § 1455. In addition, the CZMA requires that any federal agency activity affecting the state's coastal zone "be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved [CMPs]." 16 U.S.C. § 1456(c)(1). The CZMA therefore gives states with approved CMPs the right to engage in "consistency review," permitting them to conditionally veto federally permitted projects that are not consistent with "the enforceable policies of the state's approved [CMP]," subject to a final override by the Secretary of Commerce. 16 U.S.C. § 1456(c)(3)(A); *see generally Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 590-91, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) (explaining consistency review). Finally, the CZMA specifies the procedures a state must follow in order to amend its CMP, which include presentation of any such amendment to NOAA for approval. *See* 16 U.S.C. § 1455(e).

II

The facts of this case are not disputed. To meet the demand for natural gas in the Mid-Atlantic region, AES proposes to build an LNG import terminal with the necessary transmission pipeline at Sparrows Point, a

heavily industrialized coastal area on the Chesapeake Bay in the County. LNG, which is natural gas that has been cooled to -260 degrees Fahrenheit to form a liquid, occupies one six-hundredth of the volume of natural gas in its gaseous state. AES' proposed terminal would receive LNG, store it, and regasify it for transportation and delivery to residential, commercial, and industrial end users. Because LNG can be economically transported by sea from gas-producing areas worldwide to many domestic and foreign markets, LNG import terminals are typically sited in coastal areas with shipping access to foreign countries.

In 2006, responding to public opposition to the siting of an LNG terminal at Sparrows Point, the County Council approved Bill 71-06, which amended the County's Zoning Regulations to provide that an LNG terminal can only be constructed with a "special exception" and must be located at least five miles from residential zones and 500 feet from businesses. J.A. 79. This zoning amendment would have prevented AES from constructing an LNG facility at Sparrows Point.

Following passage of Bill 71-06, AES brought suit in federal court, arguing that Bill 71-06 was preempted under the Supremacy Clause of the United States Constitution by the NGA's grant of exclusive authority to FERC to site LNG terminals. The district court agreed and enjoined the County from enforcing the zoning ordinance. *See AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp. 2d 586, 601 (D. Md. 2007)("*AES I*").

The County responded in 2007 by passing Bill 9-07, which takes a different approach to banning LNG

facilities at Sparrows Point. Instead of restricting LNG terminal siting based on proximity to residential and commercial areas, Bill 9-07 makes the restriction on LNG facilities a matter of coastal concern by amending the County's Zoning Regulations to include LNG terminals among the prohibited uses in the Chesapeake Bay Critical Area.[4] Because the proposed Sparrows Point site is located within the County's Chesapeake Bay Critical Area,[5] Bill 9-07 prevents AES from constructing an LNG facility there.

AES then filed the present suit, seeking essentially the same injunctive and declaratory relief as in *AES I*. The County responded by requesting that Maryland's Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission") amend the County's Chesapeake and Atlantic Coastal Bays Critical Area Protection Program ("CAPP") to include Bill 9-07's restriction on LNG terminal siting in coastal areas. The CAPP was enacted pursuant to Md. Code Ann., Nat. Res. §§ 8-1801 et seq., and is one of over 50 state laws identified in Maryland's CMP as effectuating Maryland's coastal management policies.[6] Before the district court rendered its decision, the Critical Area Commission approved the adoption of Bill 9-07 into the CAPP. Maryland, however, never presented Bill 9-07 to NOAA for approval by that agency, pursuant to the CZMA's procedures for amending state CMPs.

The district court concluded that Bill 9-07 was not preempted by the NGA. Reasoning that by adopting Bill 9-07 into the County's CAPP, Maryland also had incorporated it into its CMP, the district court concluded that Bill 9-07 represented an exercise of

Maryland's "delegated authority" under the CZMA and was thus saved from preemption by the NGA's Savings Clause. The district court also held that Bill 9-07 does not facially discriminate against or unduly burden interstate and foreign commerce in violation of the Commerce Clause of the United States Constitution. Accordingly, the district court denied AES' request for declaratory and injunctive relief and granted summary judgment in favor of the County. This appeal followed.

III

AES' primary contention on appeal, as below, is that Bill 9-07 is preempted by the NGA. We review this legal question *de novo*. *Cox v. Shalala*, 112 F.3d 151, 153 (4th Cir. 1997).[7]

A.

The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (internal quotation omitted). Nevertheless, in evaluating arguments based on the Supremacy Clause, we begin with "the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purposes of Congress." *Id.* (internal quotation and citation omitted). As always,

we look first to the language of a statute to determine Congress' intent. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002). When that intent is "explicitly stated in the statute's language," conflicting state law is expressly preempted. *Cipollone*, 505 U.S. at 516 (internal quotation omitted).

B.

The NGA provides that FERC "shall have the *exclusive* authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1) (emphasis added). Viewed in isolation, this grant of exclusive authority to FERC leaves state and local governments with no residual power to site LNG terminals or to take actions that would effectively approve or deny such siting. *See AES I*, 470 F. Supp. 2d at 598. Accordingly, unless a state law prohibiting the siting of LNG terminals is exempted from § 717b(e)(1)'s preemptive effect by some other provision of federal law, it is unenforceable under the Supremacy Clause.

The County argues that the NGA's Savings Clause operates to save Bill 9-07 from preemption by § 717b(e)(1). Specifically, the County contends that because Bill 9-07 is part of Maryland's Critical Area Laws, which in turn are one component of the state's CMP, the County's ban on the siting of LNG terminals in the Chesapeake Bay Critical Area is the exercise of its rights under the CZMA.

We reject the County's argument. The Savings Clause exempts "rights of States under" the CZMA from the preemptive force of FERC's exclusive authority to site

LNG terminals. The mechanism the CZMA provides for the exercise of those rights--whatever their content or source--is a federally approved CMP. Thus, the County has no authority under the CZMA to enact a ban on LNG terminals unless, at a minimum, that ban is enacted pursuant to the procedures established by the CZMA. Accordingly, our inquiry must focus first on whether Bill 9-07 has been incorporated into Maryland's CMP.

The CZMA specifies the manner by which a state may amend its approved CMP. Any state wishing to amend its approved plan must "promptly notify the Secretary [of Commerce] of any proposed amendment, modification, or other program change and submit it for the Secretary's approval." 16 U.S.C. § 1455(e)(1). An amendment becomes effective only after the Secretary approves it or fails to take action within the prescribed time. "[A] coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary." 16 U.S.C. § 1455(e)(3)(A). Further, "[a] proposed amendment, modification, or change which . . . is not finally approved . . . shall not be considered an enforceable policy" of the CMP. 16 U.S.C. § 1455(e)(3)(B).

The district court concluded that Bill 9-07 did not constitute an amendment to Maryland's CMP, but rather only "the implementation of it at the local level." J.A. 282-83. We disagree. "Amendment" for purposes of the CZMA is defined in 15 C.F.R. § 923.80(d):

> For purposes of this subpart, amendments are defined as substantial changes in one or more of the following coastal management program areas:
>
> (1) Uses subject to management;
> (2) Special management areas;
> (3) Boundaries;
> (4) Authorities and organization; and
> (5) Coordination, public involvement and the national interest.

We have no difficulty concluding that Bill 9-07 is an "amendment" of Maryland's CMP because it imposes a categorical ban on LNG terminals in the Chesapeake Bay Critical Area that the CMP did not previously contain. This, in our view, constitutes a "substantial change" in the "uses subject to management" by the CMP. It also implicates the "national interest" in the "the siting of facilities such as energy facilities which are of greater than local significance." 16 U.S.C. § 1455(d)(8).

The County does not dispute that it has never presented Bill 9-07 to NOAA for approval as required by the CZMA. The CZMA makes clear, however, that the mere adoption of Bill 9-07 into the County's CAPP by Maryland's Critical Area Commission is not sufficient to make Bill 9-07 part of Maryland's CMP.[8] Were it otherwise, a state could unilaterally amend its CMP in violation of the CZMA's requirement of federal approval.

Until NOAA approves Bill 9-07 or fails to take action after being presented with it, it is not part of

Maryland's CMP and cannot be saved from preemption by the NGA's Savings Clause.[9] Therefore, Bill 9-07 is preempted by the NGA's grant of exclusive authority to FERC "to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal," 15 U.S.C. § 717b(e)(1), and may not be enforced by the County to prevent the construction of an LNG terminal at Sparrows Point.[10]

IV

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

CONCUR BY: WILLIAMS

CONCUR

WILLIAMS, Chief Judge, concurring in the judgment:

Because I conclude that Baltimore County Bill 9-07 is expressly preempted by the Natural Gas Act under the Supremacy Clause, I would reverse the judgment of the district court. I therefore concur in the judgment. I do not agree, however, with the suggestion by the majority that Bill 9-07's express liquefied natural gas terminal ban, although "preempted" today, might be "saved" from preemption tomorrow if approved by the National Oceanic and Atmospheric Administration as an amendment to Maryland's Coastal Zone Management Plan. Majority Op. at 9-10 and n.9. I cannot see how legislation like Bill 9-07, which

expressly bans liquefied natural gas terminal siting in the Chesapeake Bay Critical Area, can ever be a "right[] of States under" the Coastal Zone Management Act.

[1]The NGA defines "LNG terminal" to include:

> [A]ll natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel.

15 U.S.C. § 717a(11).

[2]The Clean Air Act (42 U.S.C. §§ 7401, et seq.) and the Federal Water Pollution Control Act (33 U.S.C. §§ 1251, et seq.). Neither statute is relevant to this appeal.

[3]The CZMA vests this approval authority with the Secretary of Commerce, who has in turn delegated it to NOAA. *See* Dep't of Commerce Organizational Order 10-15, § 3.01(u) (May 28, 2004).

[4]Bill 9-07's definition of "Liquefied Natural Gas Facility" is substantially the same as that of the NGA. *See* J.A. 107.

[5]The Chesapeake Bay Critical Area includes, subject to certain statutory exclusions, "[a]ll waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under

Title 16 of the Environment Article" and "[a]ll land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 16 of the Environment Article." Md. Code Ann., Nat. Res. § 8-1807(a).

[6]NOAA approved Maryland's CMP in 1978, and in 1986 approved an amendment to the CMP to incorporate the CAPP. Prior to its purported amendment by Bill 9-07, Maryland's CMP contained no ban on the siting of LNG terminals in coastal zones.

[7]We find no merit in the County's contention that AES has failed to exhaust its administrative remedies before bringing suit. The doctrine of exhaustion requires parties to exhaust "*prescribed* administrative remed[ies]" prior to seeking relief in a federal court. *See Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378, 2385, 165 L. Ed. 2d 368 (2006) (emphasis added). The County identifies no mandatory administrative remedy that AES has failed to exhaust in this case.

[8]Indeed, even "routine program changes" that do not rise to the level of formal amendments must be presented to NOAA so that NOAA may ensure they are not in fact amendments. Until a state has done so, even such routine changes in a CMP cannot serve as the basis for a state's conditional veto of a federally permitted project in consistency review. *See* 15 C.F.R. § 923.84.

[9]We do not reach the question of whether Bill 9-07 would fall within the Savings Clause if it had been approved by NOAA and were properly incorporated into Maryland's CMP, and we express no opinion on

this issue. There is some indication that NOAA would not approve an LNG terminal ban as an amendment to a state's CMP, *see* Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 823-24 (Jan. 5, 2006) (discussing the intersection of the NGA and CZMA and stating that "NOAA will not approve State policies that on their face contain requirements that are preempted by Federal law."). However, NOAA could change its position or simply decline to decide at all which state policies are or are not preempted. Indeed, NOAA has approved LNG terminal bans in CMPs in the past, at least before the NGA was amended in 2005 to give FERC exclusive authority to site LNG terminals. *See New Jersey v. Delaware*, 128 S. Ct. 1410, 1426, 170 L. Ed. 2d 315 (2008) (noting that Delaware's CMP contains an LNG terminal ban approved in 1979). If NOAA changes course, we might at that time be called upon to define the meaning of "rights . . . under" the CZMA or to decide the question of whether the NGA's Savings Clause operates to save an otherwise preempted ban on LNG terminals. Those questions, however, are not before us today, and we therefore decline to address them.

[10]In light of our conclusion, we need not address AES' contention that Bill 9-07 also violates the Dormant Commerce Clause.

Civil Action No.: RDB-07-325

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AES SPARROWS POINT LNG, LLC, et al.,
Plaintiffs,

v.

JAMES T. SMITH, JR., et al.,
Defendants.

June 22, 2007, Decided

COUNSEL: For AES Sparrows Point LNG, LLC, Plaintiff: James W Bartlett, III, LEAD ATTORNEY, Scott Hamilton Philips, Semmes Bowen and Semmes PC, Baltimore, MD.; Jeffrey A Lamken, Randolph Q McManus, Baker Botts LLP, Washington DC.; Michael G Pattillo Jr, William and Connolly LLP, Washington DC.

For Mid-Atlantic Express, LLC, Plaintiff: James W Bartlett, III, LEAD ATTORNEY, Scott Hamilton Philips, Semmes Bowen and Semmes PC, Baltimore, MD.; Michael G Pattillo Jr, William and Connolly LLP, Washington DC.

For James T. Smith, Jr., County Executive, Baltimore County, William J. Wiseman, III, Zoning Commissioner, Baltimore County, Baltimore County, Maryland, Defendants: Jeffrey Grant Cook, Baltimore County Office of Law, Towson MD.; John Edward

Beverungen, Baltimore County Law Department, Towson MD.

JUDGES: Richard D. Bennett, United States District Judge.

OPINION BY: Richard D. Bennett

OPINION

MEMORANDUM OPINION

Plaintiffs AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC ("Plaintiffs") have brought this action for declaratory and injunctive relief against James T. Smith, Jr., in his official capacity as the County Executive of Baltimore County, William J. Wiseman, III, in his official capacity as the Zoning Commissioner for Baltimore County, and Baltimore County, Maryland (collectively, "Defendants" or "the County"). The Plaintiffs seek a declaration that an amendment to section 105 of the Baltimore County Zoning Regulations, as set forth in Bill 9-07 ("the Zoning Amendment"), prohibiting the siting of liquified natural gas ("LNG") facilities in the Chesapeake Bay Critical Areas in Baltimore County, is preempted under the Supremacy Clause of the United States Constitution[1] by the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* (2007), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 311, 119 Stat. 594, 685 (2005). Pending before this Court are the parties' cross-motions for summary judgment. The issues have been fully briefed by the parties and a hearing was held by this Court on June 6, 2007.

The County initially attempted to regulate LNG facilities by the passage of a zoning ordinance that prohibited the siting of LNG facilities within a certain distance of residential and commercial areas. This Court held that this earlier ordinance was unenforceable because it was preempted under the Supremacy Clause of the United States Constitution by the Natural Gas Act. *See AES Sparrows Point LNG, LLC v. Smith,* 470 F. Supp. 2d 586 (D. Md. 2007) ("*AES I*"). In that earlier opinion, this Court noted that the 2005 amendments to the Natural Gas Act expressly reserve to the states their rights pursuant to three environmental statutes: the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451, *et seq.*, the Clean Air Act, 42 U.S.C. §§ 4201, *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*[2] *Id.* at 597. The Zoning Amendment at issue in this case, unlike the first zoning ordinance, only prohibits the construction of LNG facilities in Baltimore County's environmentally sensitive Chesapeake Bay Critical Areas and has now been incorporated into the State of Maryland's Coastal Zone Management Act program. For the reasons that follow, Defendants' Motion for Summary Judgment will be GRANTED, and the Plaintiffs' Motion for Summary Judgment will be DENIED. This Court declares that the Zoning Amendment, as set forth in Bill 9-07, is not preempted by the Natural Gas Act and is within the delegated authority of the State of Maryland and Baltimore County under the Coastal Zone Management Act.

BACKGROUND

I. Factual and Procedural Background

The facts of this case were previously noted in this Court's opinion in *AES I*. Plaintiff AES Sparrows Point LNG, LLC ("AES") entered into an option agreement on November 3, 2005, to lease a site at 600 Shipyard Road in Baltimore County, Maryland, in order to construct an LNG terminal and to import, store, and regasify LNG. (Am. Compl. Ex. 1.) Pursuant to this option agreement, Mid-Atlantic Express, LLC proposes to construct and operate an 87-mile 30-inch outside diameter natural gas pipeline extending from the Sparrows Point site to interconnections with existing natural gas pipeline systems and terminating in Eagle, Pennsylvania. (*Id.* ¶ 13.) On March 24, 2006, Plaintiffs initiated the pre-filing process necessary to file a formal application with the Federal Energy Regulatory Commission ("FERC") to build an LNG terminal at the Sparrows Point site. (*Id.* at Ex. 3.)

Upon hearing of AES's plans, local groups and elected officials expressed concern about the negative effects of the proposed plant on the surrounding community and the environment. In response to public opposition, on June 19, 2006, the Baltimore County Council approved Bill 71-06, amending section 256.4 of the Baltimore County Zoning Regulations. (*Id.* at Ex. 6.) The ordinance provided that an LNG terminal could only be constructed with a "special exception" and had to be at least 5 miles from residential zones and 500 feet from business zones. (*Id.*) The ordinance would have prevented the Plaintiffs from constructing an LNG facility at Sparrows Point.

On September 22, 2006, Plaintiffs filed a lawsuit in this Court against James T. Smith, Jr., in his official capacity as the County Executive of Baltimore County,

William J. Wiseman, III, in his official capacity as the Zoning Commissioner for Baltimore County, and Baltimore County seeking declaratory and injunctive relief on the grounds that Bill 71-06 violated the Supremacy Clause of the United States Constitution and was preempted by the Natural Gas Act. The Defendants filed a motion to dismiss for lack of ripeness and subject matter jurisdiction, and the Plaintiffs filed a motion for summary judgment. After a hearing held on January 10, 2007, this Court issued an opinion granting the Plaintiffs' motion for summary judgment and denying the Defendants' motion to dismiss. *AES I*, 470 F. Supp. 2d 586 (D. Md. 2007). This Court declared the zoning ordinance to be unconstitutional under the Supremacy Clause and enjoined the County from enforcing it. *Id.* at 601.

On February 5, 2007, Baltimore County passed Bill 9-07 ("the Zoning Amendment"), which amends section 105 of the Baltimore County Zoning Regulations by adding LNG terminals to the list of prohibited uses in Chesapeake Bay Critical Areas.[3] (Am. Compl. Ex. 9 [hereinafter "Bill 9-07"].) The bill defines an LNG facility in section 101 as

> [a] natural gas facility located onshore or in state waters that is used to receive, unload, load, store, transport, gasify, regasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by a waterborne vessel.

Id. There is no dispute that the Zoning Amendment would prevent AES from constructing an LNG facility at the proposed Sparrows Point site, as the site is located within Baltimore County's Chesapeake Bay Critical Area.[4]

AES and Mid-Atlantic Express filed suit in this Court on February 6, 2007 seeking essentially the same injunctive and declaratory relief as in *AES I*. The Plaintiffs moved for a temporary restraining order ("TRO") two days later to prevent the County from halting the project pursuant to its authority under the Coastal Facilities Review Act.[5] A hearing was conducted on February 9, 2007, and this Court granted the Plaintiffs' motion for a TRO at that time, enjoining the County from certifying to the Maryland Department of the Environment that the proposed LNG facility would not meet local zoning regulations and enjoining enforcement of Bill 9-07. (Paper No. 6.) By Consent Order dated February 21, 2007, the TRO was to remain in effect until this Court ruled on the pending motions for summary judgment. (Paper No. 8.)

Meanwhile, on February 9, 2007, Baltimore County submitted a request to Maryland's Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission" or "the Commission") seeking to amend the County's Critical Area protection program to include Bill 9-07's restriction on LNG siting in coastal areas. (*See* Carroll Aff. Ex A.) On May 2, 2007, a four-person panel recommended to the Commission that Baltimore County's request to amend its local Critical Area protection program should be denied. (*See* Defs.' Status Report Att. 1 at 5 (Paper No. 21).) The panel cited concerns that the Zoning

Amendment was unenforceable because this Court had enjoined it and because it had to be approved by the National Oceanic and Atmospheric Administration ("NOAA"). (*Id.*) In response to the panel's report, Baltimore County asked the Commission to "table further action." (Pls.' Request for Hearing Att. 1 (Paper No. 22).)

The Plaintiffs filed a Motion for Summary Judgment on February 26, 2007 (Paper No. 12) and an Amended Complaint the following day (Paper No. 13). The Defendants filed a Motion for Summary Judgment on March 19, 2007. (Paper No. 16.) While this Court was conducting a hearing on the cross-motions for summary judgment on June 6, 2007, the Critical Area Commission, having reopened its review of Baltimore County's request, unanimously approved the adoption of the Zoning Amendment in the County's Critical Area protection plan. (*See* Defs.' Post-Hearing Mem. Ex. 1 (Paper No. 27).)

II. Legal Framework

A. Natural Gas Act

Under the Natural Gas Act ("NGA"), a party seeking to construct a liquefied natural gas ("LNG") terminal must first obtain authorization from the Federal Energy Regulatory Commission ("FERC"). 15 U.S.C. § 717b(a) (2007). FERC created an extensive pre-filing process in which an applicant must submit all pertinent information about the proposed site and building plans, any state and local agencies with permitting authority, the applicant's plans to receive input from the public, and additional matters. 18 C.F.R. § 157.21 (2007).

Applicants must also comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.* (2007), by examining the impact the facility would have on the environment. 15 U.S.C. § 717b-1(a) (2007). After the applicant completes the pre-filing process and submits a formal application, FERC consults with a designated state agency on state and local safety issues, including "(1) the kind and use of the facility; (2) the existing and projected population and demographic characteristics of the location; (3) the existing and proposed land use near the location; (4) the natural and physical aspects of the location; (5) the emergency response capabilities near the facility location; and (6) the need to encourage remote siting." *Id.* § 717b-1(b). It is undisputed that this process can take a considerable period of time at substantial monetary cost.

The NGA was amended in 2005 by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 311, 119 Stat. 594, 685 (2005). Congress added two provisions that are particularly relevant to this case. The first provision gives FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1) (2007). This provision was the focus of this Court's earlier opinion in *AES I*. However, the second provision specifically states that "nothing in [the NGA] affects the rights of States under-- (1) the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451, *et seq.*); (2) the Clean Air Act (42 U.S.C. §§ 4201, *et seq.*); or (3) the Federal Water Pollution Control Act (33 U.S.C. §§ 1251, *et seq.*)." 15 U.S.C. § 717b(d) (2007). In its earlier opinion in *AES I*, this Court noted the legislative history of the 2005 amendments to the NGA and the

testimony of the general counsel of FERC. 470 F. Supp. 2d at 597. That testimony and legislative history directly addressed and noted the continuing state authority over the siting of LNG terminals pursuant to the Coastal Zone Management Act and the two other environmental statutes. *Id.*

B. Coastal Zone Management Act

The Coastal Zone Management Act ("CZMA") was enacted in 1972 to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations. . . ." 16 U.S.C. § 1452 (2007). It established a long-standing policy insuring the involvement of local and state officials in the protection of coastal areas. States play an integral role in carrying out this Congressional policy by adopting a coastal management program "setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." *Id.* § 1453(12). The programs must be submitted to the Secretary of Commerce for approval, and states can receive federal funding to implement their plans subject to certain restrictions. *Id.* §§ 1455-56b. After receiving the Secretary of Commerce's approval, the states have discretion to modify and amend their CZMA plans, as enacted at the statewide and local level. Only formal changes to the original, statutory CZMA plan must be approved by the Secretary of Commerce. *Id.* § 1453(12).

C. Maryland's Coastal Management Program

Pursuant to its authority under the CZMA, Maryland enacted a Coastal Management Program ("MCMP")

which received approval from the Secretary of Commerce in 1978. (*See* Defs.' Reply Ex. 1; Carroll Aff. ¶ 9.) The MCMP "is referred to as a 'networked' program, whereby several regulatory agencies and statutory enforcement mechanisms are linked to provide a framework for making and implementing land use decisions in the State's coastal zones." (Carroll Aff. ¶ 9.) Two such enforcement mechanisms are particularly relevant to this lawsuit: the Coastal Facilities Review Act, Md. Code Ann., Envir. §§ 14-501, *et seq.* (LexisNexis 1996 & Supp. 2005), and the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program, Md. Code Ann., Nat. Res. §§ 8-1801, *et seq.* (LexisNexis 2000 & Supp. 2005).

1. Coastal Facilities Review Act

Under the Coastal Facilities Review Act ("CFRA"), a company must obtain a permit from the Maryland Department of the Environment before constructing a "facility" within the State's coastal areas. Md. Code Ann., Envir. § 14-503(a) (LexisNexis 1996 & Supp. 2005). A "facility" includes "[a]ny pipeline carrying crude oil or natural gas ashore from offshore sources" as well as "[a]ny facility for the processing, transmission, or storage of natural gas. . . ." *Id.* § 14-502(e). The permitting process includes a lengthy application, and the Department of the Environment designates a party to research and write a statement regarding the project's "economic, fiscal, and environmental impact." *Id.* § 14-506(a)-(b). Local governments also play a role in the process:

> The application shall not be processed further nor shall the analysis required be undertaken

> until the county government wherein the facility is proposed to be located or wherein the pipeline will terminate has certified to the Department [of the Environment] that all local land use classifications, including zoning, special exceptions, variances or conditional uses, necessary for the location and operation of the proposed facility have been or will be granted.

Id. § 14-506(c). A county can certify that the proposed project will be approved or denied, or it can postpone rendering a decision. COMAR 26.22.01.06(A) (2007). The county's role is significant because "[i]f the county notifies the State of its denial, then the application process shall terminate," effectively preventing the facility from being built. COMAR 26.22.01.06(C) (2007).

2. Critical Area Protection Program

The Chesapeake and Atlantic Coastal Bays Critical Area Protection Program ("CAPP") was enacted to curb the "harmful" effects of human activity on the Chesapeake Bay and its tributaries by "minimiz[ing] damage to water quality and natural habitats." Md. Code Ann., Nat. Res. § 8-1801 (LexisNexis 2000 & Supp. 2005). CAPP created the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission" or "the Commission") within the Maryland Department of Natural Resources to implement the program. *Id.* § 8-1803. Local jurisdictions "have primary responsibility for developing and implementing a program, subject to review by the Commission." *Id.* § 8-1808(a). A local Critical Area protection program must include

> those elements which are necessary or appropriate: (1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands; (2) To conserve fish, wildlife, and plant habitat; and (3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

Id. § 8-1808(b). Of particular relevance to this lawsuit, a local jurisdiction's program should include "new or amended provisions of the jurisdiction's . . . [z]oning ordinances or regulations" in order to achieve those three goals. *Id.* § 8-1808(c).

STANDARD OF LAW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. *Nat'l City Bank of Indiana v. Turnbaugh*, 463 F.3d 325, 329 (4th Cir. 2006). In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). This Court has previously recognized that a case

that presents a pure question of law as to federal preemption should be resolved at the summary judgment stage. *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805, 811 (D. Md. 2005), *aff'd*, 463 F.3d 325, 329 (4th Cir. 2006); *see also Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006), *aff'd*, 475 F.3d 180 (4th Cir. 2007).

Where, as here, both parties file motions for summary judgment, the court applies the same standards of review. *Monumental Paving & Excavating, Inc. v. Penn. Mfrs.' Ass'n Ins. Co.*, 176 F.3d 794, 797 (4th Cir. 1999) (citing *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n.3 (4th Cir. 1983) ("The court is not permitted to resolve genuine issues of material fact on a motion for summary judgment -- even where . . . both parties have filed cross motions for summary judgment.") (emphasis omitted), *cert. denied*, 469 U.S. 1215, 105 S. Ct. 1191, 84 L. Ed. 2d 337 (1985)). The role of the court is to "rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard." *Towne Mgmt. Corp. v. Hartford Acc. & Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985).

ANALYSIS

Plaintiffs AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC have moved for summary judgment on the grounds that the Baltimore County Zoning Amendment (1) is preempted by the Natural Gas Act and (2) is unconstitutional on its face because it violates the dormant Commerce Clause.[6] Defendants James T. Smith, Jr., William J. Wiseman, III, and Baltimore County have also moved for summary

judgment, arguing that the Zoning Amendment was enacted pursuant to the State's Coastal Zone Management Act ("CZMA") plan and, therefore, falls within the NGA's exception for states' rights under the CZMA and two other environmental statutes.

I. Preemption

In AES I, this Court concluded that the first zoning ordinance was preempted by the NGA under all three theories of preemption: express, field, and conflict. *AES I*, 470 F. Supp. 2d at 596-600. Plaintiffs contend that the Zoning Amendment at issue in this case is preempted by the NGA under the same reasoning. However, Defendants note that the NGA's exception reserves to the states their authority under three federal environmental statutes. Specifically, they argue that the Zoning Amendment was enacted pursuant to Maryland's CZMA plan--the Maryland Coastal Management Program ("MCMP").

As discussed *supra*, one component of the MCMP is the Critical Area Protection Program ("CAPP"). Local governments have "primary responsibility" to implement their own programs to carry out CAPP's goals, subject to approval by the statewide Critical Area Commission. Md. Code Ann., Nat. Res. § 8-1808(a) (LexisNexis 2000 & Supp. 2005). Pursuant to this delegated authority, Baltimore County enacted a "local protection program" which includes a list of prohibited uses in the County's Chesapeake Bay Critical Areas. Baltimore County Zoning Regs. §§ 101, 105. The Zoning Amendment at issue in this case adds the siting of LNG terminals in Critical Areas to the list of prohibited uses and was, therefore, clearly intended to be part of the

County's local protection program. *See* Bill 9-07. Bill 9-07 specifically defines a liquefied natural gas facility as one "located onshore or in state waters" that receives natural gas that is "imported" or "exported" or "transported in interstate commerce by a *waterborne vessel.*" *Id.* (emphasis added). As noted above, on June 6, 2007, the Maryland Critical Area Commission approved Bill 9-07 as an amendment to Baltimore County's local protection plan. (*See* Defs.' Post-Hearing Mem. Ex. 1.)

Plaintiffs contend that even with the Critical Area Commission's approval, the Zoning Amendment is not enforceable unless it is specifically approved by the Secretary of Commerce.[7] (Pls.' Mem. Supp. Summ. J. 13.) They argue that the CZMA requires that formal amendments to a state's statutory coastal management plan be approved by the Secretary and further argue that any changes to the Maryland Coastal Management Program would require formal federal approval. *See* 16 U.S.C. § 1455(e) (2007). However, approval by the Critical Area Commission of Bill 9-07, or any other amendment to a local protection plan, does *not* constitute a change in the Maryland Coastal Management Program, but rather the implementation of it at the local level. Quite simply, there is no merit to the suggestion that there must be formal federal approval of each and every amendment to a local protection plan.[8]

When the Maryland Coastal Management Program was first approved in 1978, it expressly delegated authority to the local jurisdictions to create and implement individual protection plans. *See* Md. Code Ann., Nat. Res. § 8-1808(a) (LexisNexis 2000 & Supp. 2005). Thus,

the Secretary of Commerce was fully aware that the MCMP did not set forth all the details necessary to implement a statewide plan under the CZMA. Rather, the Secretary approved the plan with knowledge that local governments in Maryland would have the authority to create and amend individual plans with oversight by the Critical Area Commission to ensure that the local plans are consistent with statewide goals. Baltimore County's local protection program, in particular, has been amended several times since its inception with the approval of the Critical Area Commission. (*See* Carroll Aff. Ex. C.) Once approved by the Commission, these amendments are enforceable at the state and local levels; they "are not (and since 1978 have not) been submitted to the Department of Commerce for approval." (*Id.* ¶ 10.) For practical reasons as well, it would take a great deal of time for NOAA to approve every minor amendment made to local coastal protection plans around the country. Congress could not have intended to place such a burden on the agency. Thus, the Zoning Amendment at issue does not need to be approved by NOAA in order to become enforceable.

In its earlier opinion in *AES I*, this Court held that the first zoning amendment was clearly preempted by the Natural Gas Act, but specifically noted an exception with respect to the states' delegated authority under the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act. *See* 470 F. Supp. 2d at 597 (citing 15 U.S.C. § 717b(d) (2007)). The Zoning Amendment, as set forth in Bill 9-07, has been approved by the Maryland Critical Area Commission to become part of Baltimore County's local protection program under the Critical Area Protection Program. This Court

holds that this second zoning amendment is within the delegated authority under the Coastal Zone Management Act and is enforceable as part of the State of Maryland's Coastal Management Program. Therefore, unlike the first statute in *AES I*, the Zoning Amendment, as set forth in Bill 9-07, is not preempted by the Natural Gas Act.

II. Constitutional Challenge

Alternatively, Plaintiffs have moved for summary judgment on the ground that the Zoning Amendment is unconstitutional on its face because it violates the dormant Commerce Clause of the United States Constitution. As this Court noted in *AES I*, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). In *AES I*, this Court held that the previous zoning amendment was preempted by the Natural Gas Act and that, therefore, there were no circumstances under which the zoning amendment could be constitutionally valid. 470 F. Supp. 2d at 601. In light of the fact that the second zoning amendment is *not* preempted by the Natural Gas Act, any facial challenge to Bill 9-07 must satisfy the standard set forth in the *Salerno* case. For the following reasons, this Court finds that Bill 9-07 is constitutional on its face.

The Commerce Clause provides that "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the

Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Although the Commerce Clause expressly confers power on Congress to regulate interstate and foreign commerce, the "dormant" Commerce Clause implicitly restricts states from placing an undue burden on interstate and foreign commerce. *See Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2005). The Supreme Court recently explained the test to be applied when a law is challenged under the dormant Commerce Clause:

> To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. In this context, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity," which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1793, 167 L. Ed. 2d 655 (2007) (internal quotations and citations omitted); *see also Granholm v. Heald*, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005). A nondiscriminatory law can violate the dormant Commerce Clause as applied if it "unduly burdens interstate commerce." *GMC v. Tracy*, 519 U.S. 278, 287, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). These principles also apply with respect to foreign commerce, where the emphasis remains on "federal uniformity" in "international relations and with

respect to foreign intercourse and trade." *See Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 8, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986) (holding that "state regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause").

A. Discrimination Against Interstate & Foreign Commerce

Bill 9-07 provides generally that LNG facilities are prohibited in Chesapeake Bay Critical Areas. A liquefied natural gas facility is defined as

> [a] natural gas facility located onshore or in state waters that is used to receive, unload, load, store, transport, gasify, regasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by a *waterborne vessel.*

Id. (emphasis added). Plaintiffs contend that the prohibition on LNG facilities, as defined by the bill, is discriminatory for two reasons. First, they argue that it "singles out, for special, disfavored treatment, LNG terminals that receive LNG in *foreign* commerce; that export LNG in *foreign* commerce; or that receive and store LNG that is transported in *interstate* commerce . . . [y]et it places no restrictions whatsoever on LNG terminals that operate solely intrastate." (Pls.' Mem. Supp. Summ. J. 14-15 (emphasis in original).) Second, at

the hearing held June 6, 2007, Plaintiffs' counsel argued that Bill 9-07 discriminates on its face by prohibiting facilities that receive LNG transported by waterborne vessel while permitting facilities that receive LNG via pipeline or truck. Plaintiffs' two arguments are misplaced, because the Zoning Amendment neither benefits in-state economic interests nor unduly burdens out-of-state interests.

The purpose behind liquefying natural gas, in the Plaintiffs' own words, is to "facilitate[] the efficient transportation of natural gas from world gas-producing areas to consumers in the United States." (*See* Am. Compl. ¶ 9.) Although the Plaintiffs submitted some evidence[9] that at least one energy company in Maryland liquefies and stores natural gas in a facility for use during hours of peak demand, a practice known as "peak-shaving," Bill 9-07 does not confer a "benefit" on such facilities because they do not serve the same function as LNG facilities like the one Plaintiffs intend to build. In addition, as Defendants note, the peak-shaving facility to which Plaintiffs refer is located in Baltimore City and would not be affected by Baltimore County Bill 9-07. (Defs.' Sur-Reply 1; Carroll Suppl. Aff. ¶ 4, June 11, 2007.) The Supreme Court has held that "any notion of discrimination assumes a comparison of substantially similar entities." *GMC*, 519 U.S. at 298 (upholding differential taxation of natural gas produced by private and public utilities). The Court has also "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Associated Indus. v. Lohman*, 511 U.S. 641, 654, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994). In the absence of any actual intrastate LNG facilities located in Baltimore County, there is no

"comparison" to make for dormant Commerce Clause purposes. Thus, under the *Salerno* standard, Bill 9-07 does not currently discriminate against any out-of-state interests.

Prohibiting facilities that receive or ship LNG by waterborne vessel likewise does not benefit any in-state interests, because pipelines and trucks are often used to transport LNG *across state lines*. Rather, the prohibition on LNG facilities that import LNG by waterborne vessel is consistent with and narrowly tailored to the goals of Maryland's Critical Areas Protection Program. That program may address the risk of spillage into the Chesapeake Bay of liquefied natural gas as well as the dangers of coastal degradation.

Just as Bill 9-07 does not confer a benefit on any in-state interests, it does not unduly burden out-of-state interests. It only affects environmentally sensitive coastal areas, designated as Critical Areas, in Baltimore County. This Court, in its earlier opinion in *AES I*, held that the Federal Energy Regulatory Commission has exclusive authority over the siting of LNG terminals so long as the siting does not conflict with laws enacted pursuant to one of the three environmental statutes specifically recognized by Congress. 470 F. Supp. 2d at 597. It is within the clear, appropriate exercise of its authority that the State of Maryland and Baltimore County may enact provisions within the context of those environmental statutes. Any company, be it foreign or domestic, may construct LNG facilities in Maryland that import and export LNG across state lines and internationally as long as the construction of those facilities is not in contravention of the

environmental statutes which are clearly noted in the 2005 amendments to the Natural Gas Act.

Accordingly, this Court finds that Bill 9-07 does not discriminate on its face in violation of the dormant Commerce Clause, and the Plaintiffs have failed to satisfy the *Salerno* standard for a facial challenge to the Zoning Amendment.

B. Undue Burden on Interstate & Foreign Commerce

Finally, this Court examines whether Bill 9-07 unduly burdens interstate or foreign commerce, as applied. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970); *see also Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 356 (4th Cir. 2006).

Bill 9-07 has only a small effect on interstate and foreign commerce. By restricting the locations where an LNG terminal can be built, Bill 9-07 does have some impact on interstate and foreign transportation of LNG. However, as discussed *supra*, the bill only prohibits the siting of LNG terminals in a small percentage of coastal land. LNG facilities can be built anywhere else in Baltimore County besides Critical Areas. This Court previously held in *AES I* that any efforts by the County to exercise a prohibition on the construction of LNG facilities are unenforceable as preempted by the

Natural Gas Act, unless they are enacted pursuant to the State's authority under the three environmental statutes enumerated by Congress. *See AES I*, 470 F. Supp. 2d at 597 (citing 15 U.S.C. § 717b(d)(2007)). Thus, any burden that Bill 9-07 imposes on interstate and foreign commerce with respect to the LNG industry is minimal at most.

This minimal burden is also clearly outweighed by a matter of local public interest: protection of the coastal areas surrounding the Chesapeake Bay. By incorporating the Zoning Amendment in Baltimore County's local protection program, the Maryland Critical Area Commission made a determination that the bill would also assist in carrying out statewide goals articulated in the Critical Areas Protection Program, such as "minimiz[ing] adverse impacts on water quality that result from pollutants that are discharged from structures" near the Chesapeake Bay. Md. Code Ann., Nat. Res. § 8-1808 (LexisNexis 2000 & Supp. 2005). Finally, protection of coastal areas is also a matter of national concern. Congress expressly stated in the Natural Gas Act that "nothing in [the NGA] affects the rights of States under . . . the Coastal Zone Management Act. . . ." 15 U.S.C. § 717b(d) (2007). This indicates a national interest in protecting the integrity of coastal areas. This interest, held at the local, state, and national level, clearly outweighs the minimal burden on interstate and foreign commerce.

Accordingly, this Court holds that Bill 9-07 does not discriminate on its face or unduly burden interstate and foreign commerce in violation of the dormant Commerce Clause.

CONCLUSION

For the reasons stated above, the Plaintiffs' Motion for Summary Judgment seeking declaratory and permanent injunctive relief will be DENIED, and the Defendants' Motion for Summary Judgment will be GRANTED. A separate Order and Judgment follows.

Richard D. Bennett

United States District Judge

Date: June 22, 2007

ORDER AND JUDGMENT

In accordance with the foregoing Memorandum Opinion, IT IS this 22nd day of June 2007, by the United States District Court for the District of Maryland, hereby ORDERED and ADJUDGED that:

1. Plaintiffs' Motion for Summary Judgment (Paper No. 12) is DENIED;
2. Defendants' Motion for Summary Judgment (Paper No. 16) is GRANTED;
3. Judgment IS ENTERED in favor of Defendants James T. Smith, Jr., William J. Wiseman, III, and Baltimore County, Maryland, and against Plaintiffs AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC.; and
4. The Clerk is directed to transmit copies of this Older and Judgment and the foregoing Memorandum Opinion to counsel of record and CLOSE THIS CASE.

Richard D. Bennett

United States District Judge

Footnotes

[1]U.S. CONST. art. VI.

[2] The Federal Water Pollution Control Act is commonly referred to as the Clean Water Act.

[3] As discussed in more detail *infra*, the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program is one component of Maryland's Coastal Zone Management Act plan. Local jurisdictions within the State have the delegated authority to create individual protection programs covering their Critical Areas, subject to approval by a statewide Critical Area Commission. Md. Code Ann., Nat. Res. § 8-1808(a) (LexisNexis 2000 & Supp. 2005).

[4]The Chesapeake Bay Critical Area includes the "waters of and lands under the Chesapeake Bay and its tributaries" and "[a]ll land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands. . . ." Md. Code Ann., Nat. Res. § 8-1807(a) (LexisNexis 2000 & Supp. 2005).

[5]As discussed in more detail *infra*, the Coastal Facilities Review Act ("CFRA") requires that the county in which a proposed facility would be located must certify to the Maryland Department of the Environment that the project would comply with local land use regulations or else the "application process shall terminate." Md. Code Ann., Envir. § 14-507 (LexisNexis

1996 & Supp. 2005); COMAR 26.22.01.06 (2007). Thus, Baltimore County could halt the CFRA permit process for AES by certifying that the proposed LNG facility would not comply with the local zoning regulations, as amended by Bill 9-07. Plaintiffs moved for a TRO in order to prevent the County from exercising its authority under CFRA while this lawsuit was still pending.

[6] The Commerce Clause provides "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Although the Commerce Clause expressly confers power on Congress to regulate interstate and foreign commerce, the "dormant" Commerce Clause implicitly restricts states from placing an undue burden on interstate and foreign commerce. *See Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2005).

[7] At the hearing held June 6, 2007 on the cross-motions for summary judgment, Plaintiffs argued that the National Oceanic and Atmospheric Administration ("NOAA") would not approve Bill 9-07 as an amendment to Maryland's CZMA plan. They introduced, as part of Exhibit 1, a letter dated April 5, 2007 from Assistant Attorney General Robert Zarnoch to the Honorable Joan Carter Conway, Chairman of the Maryland Senate Education, Health and Environmental Affairs Committee. (*See* Pls.' Ex. 1, Motions Hearing, Wednesday, June 6, 2007.) In his letter, Mr. Zarnoch advised the senator that a state bill aiming to restrict the construction of LNG facilities in Critical Areas would not be approved by NOAA. (*Id.*) He cited a document prepared by NOAA in which the

agency stated that some state CZMA policies that had been approved would no longer be enforceable as to LNG facilities because of the preemptive effect of the amended Natural Gas Act. (*Id.*) As Defendants aptly note, however, the information from NOAA is inadmissible hearsay. (Defs.' Post-Hearing Mem. 2.) It is well-established that hearsay evidence is "as inadmissible in support of a summary judgment motion as it would be at trial." *Stanley Martin Cos., Inc. v. Universal Forest Prods. Shoffner LLC*, 396 F. Supp. 2d 606, 613 (D. Md. 2005) (citing *Md. Highways Contractors Ass'n, Inc. v. Md.*, 933 F.2d 1246, 1251-52 (4th Cir. 1991)). Thus, the letter from Assistant Attorney General Zarnoch quoting from a NOAA document cannot defeat the Defendants' Motion for Summary Judgment.

[8]In 2005, the Maryland Department of Natural Resources received approval from the National Oceanic and Atmospheric Administration for routine program changes to the Coastal Facilities Review Act portion of the Maryland Coastal Management Program. (*See* Defs.' Mem. Supp. Summ. J. Ex. 2.)

[9] In their correspondence to the Court following the hearing on June 6, 2007, Plaintiffs submitted an excerpt from Baltimore Gas and Electric Company's ("BG&E") Form 10-K, filed with the U.S. Securities and Exchange Commission. BG&E explained that it maintains a "liquefied natural gas facility" to liquefy and store natural gas for use during times of heavy energy usage or emergencies. (*See* Pls.' Correspondence Supplementing Record Ex. 1 (Paper No. 26).) Plaintiffs note that this facility is located in Baltimore City's Critical Area. (*Id.* at 1.)

CHAPTER 15B—NATURAL GAS

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) **Vehicular natural gas jurisdiction**

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.
(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.
(3) "Municipality" means a city, county, or other political subdivision or agency of a State.
(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.
(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.
(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.
(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.
(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.
(10) "Vehicular natural gas" means natural gas that is ultimately used as a fuel in a self-propelled vehicle.
(11) "LNG terminal" includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or

process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) **Mandatory authorization order**

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) **Free trade agreements**

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national

treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 3301 (21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) **Expedited application and approval process**

For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) **Construction with other laws**

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) **LNG terminals**

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal

agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b–1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)

(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find [1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) **Military installations**

(1) In this subsection, the term "military installation"—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult [2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

[FN1] So in original. Probably should be "finds".

[FN2] So in original. Probably should be "coordinates and consults".

[FN3] So in original. Probably should be "coordinates and consults".

§ 717b–1. State and local safety considerations

(a) **Promulgation of regulations** [FN 1]
The Commission shall promulgate regulations on the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.
(b) **State consultation** [FN 1]
The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—
(1) the kind and use of the facility;

(2) the existing and projected population and demographic characteristics of the location;
(3) the existing and proposed land use near the location;
(4) the natural and physical aspects of the location;
(5) the emergency response capabilities near the facility location; and
(6) the need to encourage remote siting.

(c) **Advisory report** [FN 1]

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) of this section in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) **Inspections** [FN 1]

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) **Emergency Response Plan** [FN 1]

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

[FN 1] Editorially supplied

§ 717c. Rates and charges

(a) **Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) **Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) **Filing of rates and charges with Commission; public inspection of schedules**

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Title 16 Conservation

CHAPTER 33—COASTAL ZONE MANAGEMENT

§ 1451. Congressional findings

The Congress finds that—

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and

esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, exclusive economic zone, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters; [FN 1]

(g) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

(h) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

(i) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

(j) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

(k) Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved.

(l) Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence.

(m) Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal

programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.

[FN 1] So in original. Probably should be a period.

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy—

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for—

(A) the protection of natural resources, including wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the

destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters,

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(E) public access to the coasts for recreation purposes,

(F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(G) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(H) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(I) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking,

(J) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies, and

(K) the study and development, in any case in which the Secretary considers it to be appropriate, of plans for addressing the adverse effects upon the coastal zone of land subsidence and of sea level rise; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great Lakes, and improved predictability in governmental decisionmaking;

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter;

(5) to encourage coordination and cooperation with and among the appropriate Federal, State, and local agencies, and international organizations where appropriate, in collection, analysis, synthesis, and dissemination of coastal management information, research results, and technical assistance, to support State and Federal regulation of land use practices affecting the coastal and ocean resources of the United States; and

(6) to respond to changing circumstances affecting the coastal environment and coastal resource management by encouraging States to consider such issues as ocean uses potentially affecting the coastal zone.

§ 1453. Definitions

For purposes of this chapter—

(1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.), the Act of March 2, 1917 (48 U.S.C. 749) [48 U.S.C. 731 et seq.], the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 [48 U.S.C. 1801 et seq.], or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705), as applicable. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

(2) The term "coastal resource of national significance" means any coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value.

(3) The term "coastal waters" means

(A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors,

roadsteads, and estuary-type areas such as bays, shallows, and marshes and

(B) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

(4) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this chapter, the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.

(5) The term "coastal energy activity" means any of the following activities if, and to the extent that

(A) the conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion, or operation of any equipment or facility; and

(B) any technical requirement exists which, in the determination of the Secretary, necessitates that the siting, construction, expansion, or operation of such equipment or facility be carried out in, or in close proximity to, the coastal zone of any coastal state;

(i) Any outer Continental Shelf energy activity.

(ii) Any transportation, conversion, treatment, transfer, or storage of liquefied natural gas.

(iii) Any transportation, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deepwater port, as defined in section 1502 (10) of title 33).

For purposes of this paragraph, the siting, construction, expansion, or operation of any equipment or facility shall be "in close proximity to" the coastal zone of any

coastal state if such siting, construction, expansion, or operation has, or is likely to have, a significant effect on such coastal zone.

(6) The term "energy facilities" means any equipment or facility which is or will be used primarily—

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities used for the transportation, conversion, treatment, transfer, or storage of liquefied natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.

(6a) The term "enforceable policy" means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.

(7) The term "estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land

drainage. The term includes estuary-type areas of the Great Lakes.

(8) The term "estuarine sanctuary" means a research area which may include any part or all of an estuary and any island, transitional area, and upland in, adjoining, or adjacent to such estuary, and which constitutes to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

(9) The term "Fund" means the Coastal Zone Management Fund established under section 1456a (b) of this title.

(10) The term "land use" means activities which are conducted in, or on the shorelands within, the coastal zone, subject to the requirements outlined in section 1456 (g) of this title.

(11) The term "local government" means any political subdivision of, or any special entity created by, any coastal state which (in whole or part) is located in, or has authority over, such state's coastal zone and which

(A) has authority to levy taxes, or to establish and collect user fees, or

(B) provides any public facility or public service which is financed in whole or part by taxes or user fees. The term includes, but is not limited to, any school district, fire district, transportation authority, and any other special purpose district or authority.

(12) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(13) The term "outer Continental Shelf energy activity" means any exploration for, or any development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 1331 (a) of title 43) or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

(14) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any state; the Federal Government; any state, regional, or local government; or any entity of any such Federal, state, regional, or local government.

(15) The term "public facilities and public services" means facilities or services which are financed, in whole or in part, by any state or political subdivision thereof, including, but not limited to, highways and secondary roads, parking, mass transit, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care. Such term may also include any other facility or service so financed which the Secretary finds will support increased population.

(16) The term "Secretary" means the Secretary of Commerce.

(17) The term "special area management plan" means a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone.

(18) The term "water use" means a use, activity, or project conducted in or on waters within the coastal zone.

§ 1454. Submittal of State program for approval

Any coastal state which has completed the development of its management program shall submit such program to the Secretary for review and approval pursuant to section 1455 of this title.

§ 1455. Administrative grants

(a) **Authorization; matching funds**
The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:
(1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.
(2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.
(b) **Grants to coastal states; requirements**
The Secretary may make a grant to a coastal state under subsection (a) of this section only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d) of this section.
(c) **Allocation of grants to coastal states**
Grants under this section shall be allocated to coastal states with approved programs based on rules and

regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

(d) **Mandatory adoption of State management program for coastal zone**

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.

(2) The management program includes each of the following required program elements:

(A) An identification of the boundaries of the coastal zone subject to the management program.

(B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(C) An inventory and designation of areas of particular concern within the coastal zone.

(D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of

relevant State constitutional provisions, laws, regulations, and judicial decisions.

(E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development [1] to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for

control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

(e) **Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)

(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

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[1] So in original. Probably should be followed by a comma.

§ 1455a. Coastal resource improvement program

(a) **Definitions**

For purposes of this section—

(1) The term "eligible coastal state" means a coastal state that for any fiscal year for which a grant is applied for under this section—

(A) has a management program approved under section 1455 of this title; and

(B) in the judgment of the Secretary, is making satisfactory progress in activities designed to result in significant improvement in achieving the coastal management objectives specified in section 1452 (2)(A) through (K) of this title.

(2) The term "urban waterfront and port" means any developed area that is densely populated and is being used for, or has been used for, urban residential recreational, commercial, shipping or industrial purposes.

(b) **Resource management improvement grants**

The Secretary may make grants to any eligible coastal state to assist that state in meeting one or more of the following objectives:

(1) The preservation or restoration of specific areas of the state that

(A) are designated under the management program procedures required by section 1455 (d)(9) of this title because of their conservation recreational, ecological, or esthetic values, or

(B) contain one or more coastal resources of national significance, or for the purpose of restoring and enhancing shellfish production by the purchase and distribution of clutch material on publicly owned reef tracts.

(2) The redevelopment of deteriorating and underutilized urban waterfronts and ports that are designated in the state's management program pursuant to section 1455 (d)(2)(C) of this title as areas of particular concern.

(3) The provision of access to public beaches and other public coastal areas and to coastal waters in accordance with the planning process required under section 1455 (d)(2)(G) of this title.

(4) The development of a coordinated process among State agencies to regulate and issue permits for aquaculture facilities in the coastal zone.

(c) **Uses, terms and conditions of grants**

(1) Each grant made by the Secretary under this section shall be subject to such terms and conditions as

may be appropriate to ensure that the grant is used for purposes consistent with this section.

(2) Grants made under this section may be used for—

(A) the acquisition of fee simple and other interests in land;

(B) low-cost construction projects determined by the Secretary to be consistent with the purposes of this section, including but not limited to, paths, walkways, fences, parks, and the rehabilitation of historic buildings and structures; except that not more than 50 per centum of any grant made under this section may be used for such construction projects;

(C) in the case of grants made for objectives described in subsection (b)(2) of this section—

(i) the rehabilitation or acquisition of piers to provide increased public use, including compatible commercial activity.

(ii) the establishment of shoreline stabilization measures including the installation or rehabilitation of bulkheads for the purpose of public safety or increasing public access and use, and

(iii) the removal or replacement of pilings where such action will provide increased recreational use of urban waterfront areas,

but activities provided for under this paragraph shall not be treated as construction projects subject to the limitations in paragraph (B);

(D) engineering designs, specifications, and other appropriate reports; and

(E) educational, interpretive, and management costs and such other related costs as the Secretary determines to be consistent with the purposes of this section.

(d) State matching contributions; ratio; maximum amount of grants

(1) The Secretary may make grants to any coastal state for the purpose of carrying out the project or purpose for which such grants are awarded, if the state matches any such grant according to the following ratios of Federal to state contributions for the applicable fiscal year: 4 to 1 for fiscal year 1986; 2.3 to 1 for fiscal year 1987; 1.5 to 1 for fiscal year 1988; and 1 to 1 for each fiscal year after fiscal year 1988.

(2) Grants provided under this section may be used to pay a coastal state's share of costs required under any other Federal program that is consistent with the purposes of this section.

(3) The total amount of grants made under this section to any eligible coastal state for any fiscal year may not exceed an amount equal to 10 per centum of the total amount appropriated to carry out this section for such fiscal year.

(e) **Allocation of grants to local governments and other agencies**

With the approval of the Secretary, an eligible coastal state may allocate to a local government, an areawide agency designated under section 3334 of title 42, a regional agency, or an interstate agency, a portion of any grant made under this section for the purpose of carrying out this section; except that such an allocation shall not relieve that state of the responsibility for ensuring that any funds so allocated are applied in furtherance of the state's approved management program.

(f) **Other technical and financial assistance**

In addition to providing grants under this section, the Secretary shall assist eligible coastal states and their local governments in identifying and obtaining other sources of available Federal technical and financial assistance regarding the objectives of this section.

§ 1455b. Protecting coastal waters

(a) **In general**

(1) **Program development**

Not later than 30 months after the date of the publication of final guidance under subsection (g) of this section, each State for which a management program has been approved pursuant to section 306 of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455] shall prepare and submit to the Secretary and the Administrator a Coastal Nonpoint Pollution Control Program for approval pursuant to this section. The purpose of the program shall be to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities.

(2) **Program coordination**

A State program under this section shall be coordinated closely with State and local water quality plans and programs developed pursuant to sections 1288, 1313, 1329, and 1330 of title 33 and with State plans developed pursuant to the Coastal Zone Management Act of 1972, as amended by this Act [16 U.S.C. 1451 et seq.]. The program shall serve as an update and expansion of the State nonpoint source management program developed under section 1329 of title 33, as the program under that section relates to land and water uses affecting coastal waters.

(b) **Program contents**

Each State program under this section shall provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g) of this section, to protect coastal waters generally, and shall also contain the following:

(1) **Identifying land uses**

The identification of, and a continuing process for identifying, land uses which, individually or cumulatively, may cause or contribute significantly to a degradation of—

(A) those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, as determined by the State pursuant to its water quality planning processes; or

(B) those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources.

(2) **Identifying critical coastal areas**

The identification of, and a continuing process for identifying, critical coastal areas adjacent to coastal waters referred to in paragraph (1)(A) and (B), within which any new land uses or substantial expansion of existing land uses shall be subject to management measures in addition to those provided for in subsection (g) of this section.

(3) **Management measures**

The implementation and continuing revision from time to time of additional management measures applicable to the land uses and areas identified pursuant to paragraphs (1) and (2) that are necessary to achieve and maintain applicable water quality standards under section 1313 of title 33 and protect designated uses.

(4) **Technical assistance**

The provision of technical and other assistance to local governments and the public for implementing the measures referred to in paragraph (3), which may include assistance in developing ordinances and regulations, technical guidance, and modeling to predict and assess the effectiveness of such measures, training, financial incentives, demonstration projects, and other

innovations to protect coastal water quality and designated uses.

(5) **Public participation**

Opportunities for public participation in all aspects of the program, including the use of public notices and opportunities for comment, nomination procedures, public hearings, technical and financial assistance, public education, and other means.

(6) **Administrative coordination**

The establishment of mechanisms to improve coordination among State agencies and between State and local officials responsible for land use programs and permitting, water quality permitting and enforcement, habitat protection, and public health and safety, through the use of joint project review, memoranda of agreement, or other mechanisms.

(7) **State coastal zone boundary modification**

A proposal to modify the boundaries of the State coastal zone as the coastal management agency of the State determines is necessary to implement the recommendations made pursuant to subsection (e) of this section. If the coastal management agency does not have the authority to modify such boundaries, the program shall include recommendations for such modifications to the appropriate State authority.

(c) **Program submission, approval, and implementation**

(1) **Review and approval**

Within 6 months after the date of submission by a State of a program pursuant to this section, the Secretary and the Administrator shall jointly review the program. The program shall be approved if—

(A) the Secretary determines that the portions of the program under the authority of the Secretary meet the

requirements of this section and the Administrator concurs with that determination; and

(B) the Administrator determines that the portions of the program under the authority of the Administrator meet the requirements of this section and the Secretary concurs with that determination.

(2) **Implementation of approved program**

If the program of a State is approved in accordance with paragraph (1), the State shall implement the program, including the management measures included in the program pursuant to subsection (b) of this section, through—

(A) changes to the State plan for control of nonpoint source pollution approved under section 1329 of title 33; and

(B) changes to the State coastal zone management program developed under section 306 of the Coastal Zone Management Act of 1972, as amended by this Act [16 U.S.C. 1455].

(3) **Withholding coastal management assistance**

If the Secretary finds that a coastal State has failed to submit an approvable program as required by this section, the Secretary shall withhold for each fiscal year until such a program is submitted a portion of grants otherwise available to the State for the fiscal year under section 306 of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455], as follows:

(A) 10 percent for fiscal year 1996.

(B) 15 percent for fiscal year 1997.

(C) 20 percent for fiscal year 1998.

(D) 30 percent for fiscal year 1999 and each fiscal year thereafter.

The Secretary shall make amounts withheld under this paragraph available to coastal States having programs approved under this section.

(4) **Withholding water pollution control assistance**
If the Administrator finds that a coastal State has failed to submit an approvable program as required by this section, the Administrator shall withhold from grants available to the State under section 1329 of title 33, for each fiscal year until such a program is submitted, an amount equal to a percentage of the grants awarded to the State for the preceding fiscal year under that section, as follows:
(A) For fiscal year 1996, 10 percent of the amount awarded for fiscal year 1995.
(B) For fiscal year 1997, 15 percent of the amount awarded for fiscal year 1996.
(C) For fiscal year 1998, 20 percent of the amount awarded for fiscal year 1997.
(D) For fiscal year 1999 and each fiscal year thereafter, 30 percent of the amount awarded for fiscal year 1998 or other preceding fiscal year.
The Administrator shall make amounts withheld under this paragraph available to States having programs approved pursuant to this subsection.
(d) **Technical assistance**
The Secretary and the Administrator shall provide technical assistance to coastal States and local governments in developing and implementing programs under this section. Such assistance shall include—
(1) methods for assessing water quality impacts associated with coastal land uses;
(2) methods for assessing the cumulative water quality effects of coastal development;
(3) maintaining and from time to time revising an inventory of model ordinances, and providing other assistance to coastal States and local governments in identifying, developing, and implementing pollution control measures; and

(4) methods to predict and assess the effects of coastal land use management measures on coastal water quality and designated uses.

(e) Inland coastal zone boundaries

(1) Review

The Secretary, in consultation with the Administrator of the Environmental Protection Agency, shall, within 18 months after November 5, 1990, review the inland coastal zone boundary of each coastal State program which has been approved or is proposed for approval under section 306 of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455], and evaluate whether the State's coastal zone boundary extends inland to the extent necessary to control the land and water uses that have a significant impact on coastal waters of the State.

(2) Recommendation

If the Secretary, in consultation with the Administrator, finds that modifications to the inland boundaries of a State's coastal zone are necessary for that State to more effectively manage land and water uses to protect coastal waters, the Secretary, in consultation with the Administrator, shall recommend appropriate modifications in writing to the affected State.

(f) Financial assistance

(1) In general

Upon request of a State having a program approved under section 306 of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455], the Secretary, in consultation with the Administrator, may provide grants to the State for use for developing a State program under this section.

(2) Amount

The total amount of grants to a State under this subsection shall not exceed 50 percent of the total cost to the State of developing a program under this section.

(3) **State share**

The State share of the cost of an activity carried out with a grant under this subsection shall be paid from amounts from non-Federal sources.

(4) **Allocation**

Amounts available for grants under this subsection shall be allocated among States in accordance with regulations issued pursuant to section 306(c) of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455 (c)], except that the Secretary may use not more than 25 percent of amounts available for such grants to assist States which the Secretary, in consultation with the Administrator, determines are making exemplary progress in preparing a State program under this section or have extreme needs with respect to coastal water quality.

(g) **Guidance for coastal nonpoint source pollution control**

(1) **In general**

The Administrator, in consultation with the Secretary and the Director of the United States Fish and Wildlife Service and other Federal agencies, shall publish (and periodically revise thereafter) guidance for specifying management measures for sources of nonpoint pollution in coastal waters.

(2) **Content**

Guidance under this subsection shall include, at a minimum—

(A) a description of a range of methods, measures, or practices, including structural and nonstructural controls and operation and maintenance procedures, that constitute each measure;

(B) a description of the categories and subcategories of activities and locations for which each measure may be suitable;

(C) an identification of the individual pollutants or categories or classes of pollutants that may be controlled by the measures and the water quality effects of the measures;

(D) quantitative estimates of the pollution reduction effects and costs of the measures;

(E) a description of the factors which should be taken into account in adapting the measures to specific sites or locations; and

(F) any necessary monitoring techniques to accompany the measures to assess over time the success of the measures in reducing pollution loads and improving water quality.

(3) **Publication**

The Administrator, in consultation with the Secretary, shall publish—

(A) proposed guidance pursuant to this subsection not later than 6 months after November 5, 1990; and

(B) final guidance pursuant to this subsection not later than 18 months after November 5, 1990.

(4) **Notice and comment**

The Administrator shall provide to coastal States and other interested persons an opportunity to provide written comments on proposed guidance under this subsection.

(5) **Management measures**

For purposes of this subsection, the term "management measures" means economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best

available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives.

(h) **Authorization of appropriations**

(1) **Administrator**

There is authorized to be appropriated to the Administrator for use for carrying out this section not more than $1,000,000 for each of fiscal years 1992, 1993, and 1994.

(2) **Secretary**

(A) Of amounts appropriated to the Secretary for a fiscal year under section 318(a)(4) [1] of the Coastal Zone Management Act of 1972, as amended by this Act, not more than $1,000,000 shall be available for use by the Secretary for carrying out this section for that fiscal year, other than for providing in the form of grants under subsection (f) of this section.

(B) There is authorized to be appropriated to the Secretary for use for providing in the form of grants under subsection (f) of this section not more than—

(i) $6,000,000 for fiscal year 1992;

(ii) $12,000,000 for fiscal year 1993;

(iii) $12,000,000 for fiscal year 1994; and

(iv) $12,000,000 for fiscal year 1995.

(i) **Definitions**

In this section—

(1) the term "Administrator" means the Administrator of the Environmental Protection Agency;

(2) the term "coastal State" has the meaning given the term "coastal state" under section 304 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453);

(3) each of the terms "coastal waters" and "coastal zone" has the meaning that term has in the Coastal Zone Management Act of 1972 [16 U.S.C. 1451 et seq.];

(4) the term "coastal management agency" means a State agency designated pursuant to section 306(d)(6) of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455 (d)(6)];
(5) the term "land use" includes a use of waters adjacent to coastal waters; and
(6) the term "Secretary" means the Secretary of Commerce.

TITLE 8. WATERS

§ 8-1801. Declaration of public policy.

(a) Findings.- The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation, and their beauty, their ecological value, and their economic impact all reach far beyond any one local jurisdiction;

(2) The shoreline and adjacent lands, particularly the buffer areas, constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent

structures or an increase in lot coverage is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake and the Atlantic Coastal Bays, and their tributaries;

(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;

(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes, and it is therefore imperative that State law protect irreplaceable State buffer resources from unpermitted activity; and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development and more effective enforcement in a consistent and uniform manner along shoreline areas of the Chesapeake and the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

(b) Purpose.- It is the purpose of the General Assembly in enacting this subtitle:

(1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State and local leadership, criteria and oversight.

§ 8-1802. Definitions; parties subject to obligation imposed by subtitle.

(a) In general.-

(1) In this subtitle the following words have the meanings indicated.

(2) "Atlantic Coastal Bays" means the Assawoman, Isle of Wight, Sinepuxent, Newport, and Chincoteague Bays.

(3) "Atlantic Coastal Bays Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(4) "Buffer" means an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from man-made disturbances.

(5) "Chesapeake Bay Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(6) "Commission" means the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays established in this subtitle.

(7) "Critical Area" means the Chesapeake Bay Critical Area and the Atlantic Coastal Bays Critical Area.

(8) "Developer" means:

(i) A person who undertakes development as defined in this section; or

(ii) A person who undertakes development activities as defined in the criteria of the Commission.

(9) "Development" means any activity that materially affects the condition or use of dry land, land under water, or any structure.

(10) (i) "Dwelling unit" means a single unit providing complete, independent living facilities for at least one person, including permanent provisions for sanitation, cooking, eating, sleeping, and other activities routinely associated with daily life.

(ii) "Dwelling unit" includes a living quarters for a domestic or other employee or tenant, an in-law or accessory apartment, a guest house, or a caretaker residence.

(11) "Growth allocation" means the number of acres of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas.

(12) "Includes" means includes or including by way of illustration and not by way of limitation.

(13) (i) "Intensely developed area" means an area of at least 20 acres or the entire upland portion of the critical area within a municipal corporation, whichever is less, where:

1. Residential, commercial, institutional, or industrial developed land uses predominate; and

2. A relatively small amount of natural habitat occurs.

(ii) "Intensely developed area" includes:

1. An area with a housing density of at least four dwelling units per acre;

2. An area with public water and sewer systems with a housing density of more than three dwelling units per acre; or

3. A commercial marina redesignated by a local jurisdiction from a resource conservation area or limited development area to an intensely developed area through a mapping correction that occurred before January 1, 2006.

(14) "Land classification" means the designation of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in accordance with the criteria adopted by the Commission as an intensely developed area or district, a limited development area or district, or a resource conservation area or district.

(15) (i) "Limited development area" means an area:

1. That is developed in low or moderate intensity uses and contains areas of natural plant and animal habitat; and

2. Where the quality of runoff has not been substantially altered or impaired.

(ii) "Limited development area" includes an area:

1. With a housing density ranging from one dwelling unit per five acres up to four dwelling units per acre;

2. With a public water or sewer system;

3. That is not dominated by agricultural land, wetland, forests, barren land, surface water, or open space; or

4. That is less than 20 acres and otherwise qualifies as an intensely developed area under paragraph (13) of this subsection.

(16) "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area, as defined in this subtitle, is located.

(17) (i) "Lot coverage" means the percentage of a total lot or parcel that is:

1. Occupied by a structure, accessory structure, parking area, driveway, walkway, or roadway; or

2. Covered with gravel, stone, shell,impermeable decking, a paver, permeable pavement, or any manmade material.

(ii) "Lot coverage" includes the ground area covered or occupied by a stairway or impermeable deck.

(iii) "Lot coverage" does not include:

1. A fence or wall that is less than 1 foot in width that has not been constructed with a footer;

2. A walkway in the buffer or expanded buffer, including a stairway, that provides direct access to a community or private pier;

3. A wood mulch pathway; or
4. A deck with gaps to allow water to pass freely.

(18) (i) "Program" means the critical area protection program of a local jurisdiction.

(ii) "Program" includes any amendments to the program.

(19) (i) "Program amendment" means any change or proposed change to an adopted program that is not determined by the Commission chairman to be a program refinement.

(ii) "Program amendment" includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.

(20) (i) "Program refinement" means any change or proposed change to an adopted program that the Commission chairman determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner consistent with the adopted program, or that will not significantly affect the use of land or water in the critical area.

(ii) "Program refinement" may include:

1. A change to an adopted program that results from State law;

2. A change to an adopted program that affects local processes and procedures;

3. A change to a local ordinance or code that clarifies an existing provision; and

4. A minor change to an element of an adopted program that is clearly consistent with the provisions of this subtitle and all of the criteria of the Commission.

(21) (i) "Project approval" means the approval of development, other than development by a State or local government agency, in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local approval authority.

(ii) "Project approval" includes:

1. Approval of subdivision plats and site plans;

2. Inclusion of areas within floating zones;

3. Issuance of variances, special exceptions, and conditional use permits; and

4. Approval of rezoning.

(iii) "Project approval" does not include building permits.

(22) (i) "Resource conservation area" means an area that is characterized by:

1. Nature dominated environments, such as wetlands, surface water, forests, and open space; and

2. Resource-based activities, such as agriculture, forestry, fisheries, or aquaculture.

(ii) "Resource conservation area" includes an area with a housing density of less than one dwelling per five acres.

(23) "Tributary stream" means a perennial stream or an intermittent stream within the critical area that has been identified by site inspection or in accordance with local program procedures approved by the Commission.

(b) Parties subject to obligation imposed by subtitle.- Wherever this subtitle requires Prince George's County to exercise any power or authority Prince George's County shares with the Maryland-National Capital Park and Planning Commission, the obligation imposed by this subtitle rests on both the county and the Maryland-National Capital Park and Planning Commission in accordance with their respective powers and authorities.

§ 8-1803. Chesapeake and Atlantic Coastal Bays Critical Area Commission created; authority of Secretary.

(a) Commission created.- There is a Critical Area Commission for the Chesapeake and Atlantic Coastal Bays in the Department.

(b) Authority of Secretary.- The Secretary has no authority under Title 1 of this article:

(1) To approve, alter, or amend the policies or programs of the Commission;

(2) To transfer, assign, or reassign statutory functions or activities to or from the Commission; or

(3) To adopt, approve, or revise regulations of the Commission.

§ 8-1804. Composition, compensation, terms, vacancies, and quorum of Commission.

(a) In general.-

(1) The Commission consists of 29 voting members who are appointed by the Governor, as follows:

(i) A full-time chairman, appointed with the advice and consent of the Senate, who shall serve at the pleasure of the Governor;

(ii) 13 individuals, appointed with the advice and consent of the Senate, each of whom is a resident and an elected or appointed official of a local jurisdiction. At least 1 of these 13 individuals must be an elected or appointed official of a municipality. These individuals shall serve on the Commission only while they hold local office. Each shall be selected from certain counties or from municipalities within the counties as follows, and only after the Governor has consulted with elected county and municipal officials:

1. 1 from each of Baltimore City and Anne Arundel, Baltimore, and Prince George's counties;

2. 1 from Harford County or Cecil County;

3. 1 from Kent County or Queen Anne's County;

4. 1 from Caroline County;

5. 1 from Talbot County or Dorchester County;

6. 1 from Wicomico County or Somerset County;

7. 2 from Calvert County, Charles County, or St. Mary's County, both of whom may not be from the same county; and

8. 2 from Worcester County, 1 of whom shall be a resident of the Chesapeake Bay Watershed and the other of whom shall be a resident of the Atlantic Coastal Bays Watershed;

(iii) 8 individuals, appointed with the advice and consent of the Senate, who shall represent diverse interests, and among whom shall be a resident from each of the 5 counties that are listed and from which an appointment has not been made under paragraph (2) of this subsection and 3 of the 8 members appointed under this item shall be at large members, 1 of whom shall be a private citizen and resident of the Atlantic Coastal Bays Watershed; and

(iv) The Secretaries of Agriculture, Business and Economic Development, Housing and Community Development, the Environment, Transportation, Natural Resources, and Planning, ex officio, or the designee of the Secretaries.

(2) Of the 2 Worcester County members from the Atlantic Coastal Bays Watershed, 1 shall be the Mayor of Ocean City.

(b) Compensation.- A member of the Commission who does not hold another office of profit at the State or

local level shall be entitled to compensation as provided in the budget. Members of the Commission shall be entitled to reimbursement for expenses as provided in the budget.

(c) Length of terms; removal of members; filling vacancies.- Except for the chairman and ex officio State officers or their representatives:

(1) The term of a member is 4 years;

(2) The terms of members are staggered as required by the terms provided for members of the Commission on July 1, 1984;

(3) At the end of a term, a member continues to serve until a successor is appointed and qualifies;

(4) A member who is appointed after a term is begun serves for the rest of the term and until a successor is appointed and qualifies;

(5) A member may serve no more than 2 terms; and

(6) Any member of the Commission appointed by the Governor who shall fail to attend at least 60% of the meetings of the Commission during any period of 12 consecutive months shall be considered to have resigned, and the chairman shall forward the member's name to the Governor, not later than January 15 of the year following the nonattendance with the statement of the nonattendance, and the Governor shall appoint a successor for the remainder of the term. If the member has been unable to attend meetings as required by this subtitle for reasons satisfactory to the Governor, the

Governor may waive the resignation if the reasons are made public.

(d) Vacancies other than by expiration of term.- If a vacancy arises other than by the expiration of a term, the Governor shall appoint within 30 days, with the advice and consent of the Senate, a successor of like qualification to serve the remainder of the term.

(e) Quorum.-

(1) A quorum of the Commission consists of 1 member more than a majority of the full authorized membership of the Commission.

(2) A quorum of a panel of the Commission consists of 3 members.

(3) The Commission or a panel of the Commission may not hold a public hearing unless a quorum is present.

(4) The Commission or a panel of the Commission may not take any official action unless:

(i) A quorum is present; and

(ii) A majority of the members who are present and eligible to vote concur in or vote for the action.

§ 8-1805. Commission staff.

(a) In general.- The Commission shall have the staff provided for in the State budget.

(1) The staff assigned to the Coastal Zone Management Program in the Department shall assist the Commission in the development of regulations and the review of programs.

(2) The State departments represented on the Commission may lend staff or other assistance to the Commission.

(b) Executive Director.-

(1) The chairman with the approval of the Commission shall appoint an Executive Director for the Commission.

(2) The Executive Director serves at the pleasure of the chairman and is entitled to the salary provided in the State budget.

(3) The Executive Director shall direct the staff of the Commission.

(c) Assistant Attorney General.- The Attorney General shall designate an assistant Attorney General to advise and represent the chairman and the Commission.

§ 8-1806. Powers of the Commission.

(a) Powers.- The Commission has all powers necessary for carrying out the purposes of this subtitle, including the following:

(1) To adopt regulations and criteria in accordance with Title 2, Subtitle 5 (Joint Committee on Administrative, Executive and Legislative Review) and Title 10,

Subtitle 1 (Administrative Procedure Act) [FN 1] of the State Government Article,

(2) To conduct hearings in connection with policies, proposed programs, and proposed regulations or amendments to regulations;

(3) To contract for consultant or other services; and

(4) To establish an advisory committee, composed of members of the Commission and local citizens and local stakeholder groups, to make recommendations to the Commission with respect to Atlantic Coastal Bays Critical Area programs.

(b) The members of the Commission who reside in the Atlantic Coastal Bays Watershed shall serve on any committee established under subsection (a)(4) of this section.

[FN 1] State Government Sec. 10-101 et seq.

§ 8-1807. Areas Included

(a) The initial planning area for determination of the Chesapeake Bay Critical Area consists of:

(1) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 16 of the Environment Article; and

(2) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands

and the heads of tides designated under Title 16 of the Environment Article.

(b) Initial planning - Atlantic Coastal Bays.- The initial planning area for determination of the Atlantic Coastal Bays Critical Area consists of:

(1) All waters of and lands under the coastal bays and their tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 16 of the Environment Article; and

(2) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 16 of the Environment Article.

(c) Area designated as critical area.- (1) (i) In determining the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area within its boundaries, a local jurisdiction may exclude those portions of the planning area designated in subsection (a) or (b) of this section which the local jurisdiction finds to be:

1. Part of a developed, urban area in which, in view of available public facilities and applicable laws and restrictions, the imposition of a program would not substantially improve protection of tidal water quality or conservation of fish, wildlife, or plant habitats; or

2. Located at least 1,000 feet from open water and separated from open water by an area of wetlands which it is found will serve to protect tidal water

quality and fish, wildlife, or plant habitats from adverse impacts of development in the excluded area.

(ii) A portion of urban area to be excluded shall be at least 50% developed and may not be less than 2,640,000 square feet in contiguous area or the entire initial planning area located within the boundaries of a municipality, whichever is less.

(2) A local jurisdiction shall include in any program submitted to the Commission under § 8-1809 of this subtitle a designation of those portions of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area proposed for exclusion under paragraph (1) of this subsection, together with all factual information and expert opinion supporting its findings under this subsection.

(3) The Commission shall approve a local jurisdiction's designation of portions to be excluded unless the Commission finds, based on stated reasons, that the decision of the local jurisdiction was:

(i) Not supported by competent and material evidence; or

(ii) Arbitrary or capricious.

(4) If the Commission develops the program to be applied in a local jurisdiction, the Commission shall exclude areas as appropriate to meet the intent of paragraph (1) of this subsection.

(d) The Chesapeake Bay Critical Area shall consist of:

(1) Those areas designated in subsection (a) of this section, except any areas excluded in accordance with subsection (c) of this section; and

(2) Additional areas proposed for inclusion by local jurisdictions and approved by the Commission.

(e) The Atlantic Coastal Bays Critical Area shall consist of:

(1) Those areas designated in subsection (b) of this section, except any areas excluded in accordance with subsection (c) of this section; and

(2) Additional areas proposed for inclusion by local jurisdictions and approved by the Commission.

§ 8-1808. Program development.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

(2) (i) The Governor shall include in the budget a sum of money to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program under this section.

(ii) Each local jurisdiction shall submit to the Governor a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section.

(iii) The Governor shall include in the fiscal year 2003 budget a sum of money to be used for grants to reimburse local jurisdictions in the Atlantic Coastal Bays Critical Area for the reasonable costs of developing a program under this section.

(3) The Governor shall include in the budget annually a sum of money to be used for grants to assist local jurisdictions with the reasonable costs of implementing a program under this section. Each local jurisdiction shall submit to the Governor by May 1 of each year a detailed request for funds to assist in the implementation of a program under this section.

(b) Goals of program.- A program shall consist of those elements which are necessary or appropriate:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

(c) At a minimum, a program sufficient to meet the goals shall contain all of the following elements, including:

1. A map designating the critical area in a local jurisdiction;

2. A comprehensive zoning map for the critical area;

3. As necessary, new or amended provisions of the jurisdiction's:

A. Subdivision regulations;

B. Comprehensive or master plan;

C. Zoning ordinances or regulations;

D. Provisions relating to enforcement; and

E. Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission, including provisions for bringing lands into conformance with the Program as required under item 12 of this subparagraph;

4. Provisions requiring that:

A. Project approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section; and

B. The Commission shall receive written notice of local decisions regarding project approvals or denials in accordance with local procedures approved by the Commission;

5. Provisions to limit lot coverage and to require or encourage cluster development, where necessary or appropriate;

6. Establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used, provided that structures or any other use of land which is necessary for adjacent agriculture shall also be permitted in any buffer area;

7. Requirements for minimum setbacks for structures and septic fields along shorelines, including the establishment of a minimum buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

8. Designation of shoreline areas, if any, that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;

9. Designation of shoreline areas, if any, that are suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;

10. Provisions requiring that all harvesting of timber in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area be in accordance with plans approved by the district forestry board;

11. Provisions for reasonable accommodations in policies or procedures when the accommodations are necessary to avoid discrimination on the basis of

physical disability, including provisions that authorize a local jurisdiction to require removal of a structure that was installed or built to accommodate a physical disability and require restoration when the accommodation permitted by this paragraph is no longer necessary;

12. Procedures, including consolidation or reconfiguration of lots, that shall be approved by the Commission and assure that the following lots and lands are brought into conformance with the Program to the extent possible:

A. In the Chesapeake Bay Critical Area, any legal parcel of land, not being part of a recorded or approved subdivision, that was recorded as of December 1, 1985;

B. In the Chesapeake Bay Critical Area, land that was subdivided into recorded legally buildable lots, where the subdivision received the local jurisdiction's final approval before June 1, 1984;

C. In the Atlantic Coastal Bays Critical Area, any legal parcel of land, not being part of a recorded or approved subdivision, that was recorded as of June 1, 2002; and

D. In the Atlantic Coastal Bays Critical Area, land that was subdivided into recorded legally buildable lots, where the subdivision received the local jurisdiction's final approval before June 1, 2002;

13. Except as provided in subsection (d) of this section, provisions for granting a variance to the local jurisdiction's critical area program, in accordance with

regulations adopted by the Commission concerning variances set forth in COMAR 27.01.11;

14. Penalty provisions establishing that, in addition to any other penalty applicable under State or local law, each person who violates a provision of this subtitle or of a program, including a contractor, property owner, or any other person who committed, assisted, authorized, or participated in the violation is subject to a fine not exceeding $10,000; and

15. Administrative enforcement procedures in accordance with due process principles, including notice and an opportunity to be heard, and establishing that:

A. Each violation of this subtitle or of a regulation, rule, order, program, or other requirement adopted under the authority of this subtitle constitutes a separate offense;

B. Each calendar day that a violation continues constitutes a separate offense;

C. For each offense, a person shall be subject to separate fines, orders, sanctions, and other penalties;

D. Civil penalties for continuing violations shall accrue without a requirement for an additional assessment, notice, or opportunity for hearing for each separate offense;

E. On consideration of all the factors included under this subsection and any other factors in the local jurisdiction's approved program, the local jurisdiction shall impose the amount of the penalty;

F. Satisfaction of all conditions specified under paragraph (4) of this subsection shall be a condition precedent to the issuance of any permit, approval, variance, or special exception for the affected property; and

G. Unless an extension of time is appropriate because of adverse planting conditions, within 90 days of the issuance of a permit, approval, variance, or special exception for the affected property, any additional mitigation required as a condition of approval for the permit, approval, variance, or special exception shall be completed.

(2) (i) In determining the amount of the penalty to be assessed under paragraph (1)(iii)14 of this subsection, a local jurisdiction shall consider:

1. The gravity of the violation;

2. Any willfulness or negligence involved in the violation;

3. The environmental impact of the violation; and

4. The cost of restoration of the resource affected by the violation and mitigation for damage to that resource, including the cost to the State or local authorities for performing, supervising, or rendering assistance to the restoration and mitigation.

(ii) In paragraph (1)(iii)14 of this subsection, "property owner" includes two or more persons holding title to the property under any form of joint ownership.

(3) Regulations adopted under paragraph (1)(iii)15 of this subsection shall provide for the Commission's consideration of enforcement provisions submitted by a local jurisdiction that are at least as effective as enforcement requirements under this subtitle and regulations adopted under the authority of this subtitle.
(4) A local jurisdiction may not issue a permit, approval, variance, or special exception unless the person seeking the permit, approval, variance, or special exception has:

(i) Fully paid all administrative, civil, and criminal penalties imposed under paragraph (1)(iii)15 of this subsection;

(ii) Prepared a restoration or mitigation plan, approved by the local jurisdiction, to abate impacts to water quality or natural resources as a result of the violation; and

(iii) Performed the abatement measures in the approved plan in accordance with the local critical area program.

(d) Granting of variance.-

(1) In this subsection, "unwarranted hardship" means that, without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.

(2) (i) A local jurisdiction shall process an application for a variance regarding a parcel or lot that is subject to a current violation of this subtitle, a regulation adopted under the authority of this subtitle, or any provision of

an order, permit, plan, or local program in accordance with subsection (c)(1)(iii)15 of this section.

(ii) In considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program.

(iii) If the variance request is based on conditions or circumstances that are the result of actions by the applicant, a local jurisdiction shall consider that fact.

(3) (i) An applicant has the burden of proof and the burden of persuasion to overcome the presumption established under paragraph (2)(ii) of this subsection.

(ii) 1. Based on competent and substantial evidence, a local jurisdiction shall make written findings as to whether the applicant has overcome the presumption established under paragraph (2)(i) of this subsection.

2. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:

A. The applicant;

B. The local jurisdiction or any other government agency; or

C. Any other person deemed appropriate by the local jurisdiction.

(4) A variance to a local jurisdiction's critical area program may not be granted unless:

(i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant;

(ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and

(iii) Without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the provisions of the critical area program.

(5) (i) Within 10 working days after a written decision regarding a variance application is issued, the Commission shall receive a copy of the decision from a local jurisdiction.

(ii) A local jurisdiction may not issue a permit for the activity that was the subject of the variance application until the applicable 30-day appeal period has elapsed.

(6) (i) A development activity commenced without a required permit, approval, variance, or special exception is a violation of this subtitle.

(ii) A local jurisdiction may not accept an application for a variance to legalize a violation of this subtitle,

including an unpermitted structure or development activity, unless the local jurisdiction first issues a notice of violation, including assessment of an administrative or civil penalty, for the violation.

(iii) If a final adjudication of a notice of violation results in a determination that a violation has occurred, the person shall be liable for a penalty that is twice the amount of the assessment in the notice of violation, in addition to the cost of the hearing and any applicable mitigation costs.

(iv) Application for a variance under this paragraph constitutes a waiver of the right to appeal the terms of a notice of violation and its final adjudication, including the payment of any penalties and costs assessed.

(v) If the local jurisdiction finds that the activity or structure for which a variance is requested commenced without permits or approvals and:

1. Does not meet each of the variance criteria under this subsection, the local jurisdiction shall deny the requested variance and order removal or relocation of any structure and restoration of the affected resources; or

2. Does meet each of the variance criteria under this subsection, the local jurisdiction may grant approval to the requested variance.

(7) This subsection does not apply to building permits or activities that comply with a buffer exemption plan or buffer management plan of a local jurisdiction which has been approved by the Commission.

(8) Notwithstanding any provision of a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the provisions of this subsection shall apply to, and shall be applied by, a local jurisdiction in the consideration, processing, and decision on an application for a variance.

(e) Criteria for program development; joint committee.-

(1) The Commission shall adopt by regulation on or before December 1, 1985 criteria for program development and approval, which are necessary or appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, 1 in each of the following areas:

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

(2) During the hearing process, the Commission shall consult with each affected local jurisdiction.

(3) In accordance with its powers under § 8-1806(a) of this subtitle, the Commission may amend the criteria for program development and approval adopted under paragraph (1) of this subsection.

(f) Dredging not prevented.- Nothing in this section shall impede or prevent the dredging of any waterway in a critical area. However, dredging in a critical area is subject to other applicable federal and State laws and regulations.

(g) Initial land classification.- In adopting the initial land classification for the Atlantic Coastal Bays Critical Area, the local program:

(1) Of the Town of Ocean City shall classify as an intensely developed area that area that is within the municipal boundaries of Ocean City as of January 1, 2002; and

(2) Of Worcester County shall classify as an intensely developed area that area located on the western mainland that is east of Golf Course Road, south of Charles Street, and north of Route 707 (Old Bridge Road).

(h)Application.- The provisions of this subtitle and Title 27 of the Code of Maryland Regulations apply to the Atlantic Coastal Bays Critical Area.

§ 8-1808.1 Program development.

(a) Local jurisdictions to implement; grants.-

(1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

(2) (i) The Governor shall include in the budget a sum of money to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program under this section.

(ii) Each local jurisdiction shall submit to the Governor a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section.

(iii) The Governor shall include in the fiscal year 2003 budget a sum of money to be used for grants to reimburse local jurisdictions in the Atlantic Coastal Bays Critical Area for the reasonable costs of developing a program under this section.

(3) The Governor shall include in the budget annually a sum of money to be used for grants to assist local jurisdictions with the reasonable costs of implementing a program under this section. Each local jurisdiction shall submit to the Governor by May 1 of each year a detailed request for funds to assist in the implementation of a program under this section.

(b) Goals of program.- A program shall consist of those elements which are necessary or appropriate:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from

structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

(c) Elements of program.-

(1) (i) Notwithstanding any provision in a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the requirements of this subtitle shall apply to, and be applied by, a local jurisdiction as minimum standards for a program sufficient to meet the goals of the Critical Area Program.

(ii) With the approval of the Commission, a local jurisdiction may establish procedures for the granting of an administrative variance.

(iii) at a minimum, a program shall contain all of the following elements, including:

1. A map designating the critical area in a local jurisdiction;

2. A comprehensive zoning map for the critical area;

3. As necessary, new or amended provisions of the jurisdiction's:

A. Subdivision regulations;

B. Comprehensive or master plan;

C. Zoning ordinances or regulations;

D. Provisions relating to enforcement; and

E. Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission, including provisions for bringing lands into conformance with the Program as required under item 12 of this subparagraph;

4. Provisions requiring that:

A. Project approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section; and

B. The Commission shall receive written notice of local decisions regarding project approvals or denials in accordance with local procedures approved by the Commission;

5. Provisions to limit lot coverage and to require or encourage cluster development, where necessary or appropriate;

6. Establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used, provided that structures or any other use of land which is necessary for adjacent agriculture shall also be permitted in any buffer area;

7. Requirements for minimum setbacks for structures and septic fields along shorelines, including the establishment of a minimum buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

8. Designation of shoreline areas, if any, that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;
9. Designation of shoreline areas, if any, that are suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;

10. Provisions requiring that all harvesting of timber in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area be in accordance with plans approved by the district forestry board;

11. Provisions for reasonable accommodations in policies or procedures when the accommodations are necessary to avoid discrimination on the basis of physical disability, including provisions that authorize a local jurisdiction to require removal of a structure that was installed or built to accommodate a physical disability and require restoration when the accommodation permitted by this paragraph is no longer necessary;

12. Procedures, including consolidation or reconfiguration of lots, that shall be approved by the Commission and assure that the following lots and lands are brought into conformance with the Program to the extent possible:

A. In the Chesapeake Bay Critical Area, any legal parcel of land, not being part of a recorded or approved subdivision, that was recorded as of December 1, 1985;

B. In the Chesapeake Bay Critical Area, land that was subdivided into recorded legally buildable lots, where the subdivision received the local jurisdiction's final approval before June 1, 1984;

C. In the Atlantic Coastal Bays Critical Area, any legal parcel of land, not being part of a recorded or approved subdivision, that was recorded as of June 1, 2002; and

D. In the Atlantic Coastal Bays Critical Area, land that was subdivided into recorded legally buildable lots, where the subdivision received the local jurisdiction's final approval before June 1, 2002;

13. Except as provided in subsection (d) of this section, provisions for granting a variance to the local jurisdiction's critical area program, in accordance with regulations adopted by the Commission concerning variances set forth in COMAR 27.01.11;

14. Penalty provisions establishing that, in addition to any other penalty applicable under State or local law, each person who violates a provision of this subtitle or of a program, including a contractor, property owner, or any other person who committed, assisted, authorized, or participated in the violation is subject to a fine not exceeding $10,000; and

15. Administrative enforcement procedures in accordance with due process principles, including notice and an opportunity to be heard, and establishing that:

A. Each violation of this subtitle or of a regulation, rule, order, program, or other requirement adopted under the authority of this subtitle constitutes a separate offense;

B. Each calendar day that a violation continues constitutes a separate offense;

C. For each offense, a person shall be subject to separate fines, orders, sanctions, and other penalties;

D. Civil penalties for continuing violations shall accrue without a requirement for an additional assessment, notice, or opportunity for hearing for each separate offense;

E. On consideration of all the factors included under this subsection and any other factors in the local jurisdiction's approved program, the local jurisdiction shall impose the amount of the penalty;

F. Satisfaction of all conditions specified under paragraph (4) of this subsection shall be a condition precedent to the issuance of any permit, approval, variance, or special exception for the affected property; and

G. Unless an extension of time is appropriate because of adverse planting conditions, within 90 days of the issuance of a permit, approval, variance, or special exception for the affected property, any additional mitigation required as a condition of approval for the permit, approval, variance, or special exception shall be completed.

(2) (i) In determining the amount of the penalty to be assessed under paragraph (1)(iii)14 of this subsection, a local jurisdiction shall consider:

1. The gravity of the violation;

2. Any willfulness or negligence involved in the violation;

3. The environmental impact of the violation; and

4. The cost of restoration of the resource affected by the violation and mitigation for damage to that resource, including the cost to the State or local authorities for performing, supervising, or rendering assistance to the restoration and mitigation.

(ii) In paragraph (1)(iii)14 of this subsection, "property owner" includes two or more persons holding title to the property under any form of joint ownership.

(3) Regulations adopted under paragraph (1)(iii)15 of this subsection shall provide for the Commission's consideration of enforcement provisions submitted by a local jurisdiction that are at least as effective as enforcement requirements under this subtitle and regulations adopted under the authority of this subtitle.

(4) A local jurisdiction may not issue a permit, approval, variance, or special exception unless the person seeking the permit, approval, variance, or special exception has:

(i) Fully paid all administrative, civil, and criminal penalties imposed under paragraph (1)(iii)15 of this subsection;

(ii) Prepared a restoration or mitigation plan, approved by the local jurisdiction, to abate impacts to water quality or natural resources as a result of the violation; and

(iii) Performed the abatement measures in the approved plan in accordance with the local critical area program.

(d) Granting of variance.-

(1) In this subsection, "unwarranted hardship" means that, without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.

(2) (i) A local jurisdiction shall process an application for a variance regarding a parcel or lot that is subject to a current violation of this subtitle, a regulation adopted under the authority of this subtitle, or any provision of an order, permit, plan, or local program in accordance with subsection (c)(1)(iii)15 of this section.

(ii) In considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program.

(iii) If the variance request is based on conditions or circumstances that are the result of actions by the applicant, a local jurisdiction shall consider that fact.

(3) (i) An applicant has the burden of proof and the burden of persuasion to overcome the presumption established under paragraph (2)(ii) of this subsection.

(ii) 1. Based on competent and substantial evidence, a local jurisdiction shall make written findings as to whether the applicant has overcome the presumption established under paragraph (2)(i) of this subsection.

2. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:

A. The applicant;

B. The local jurisdiction or any other government agency; or

C. Any other person deemed appropriate by the local jurisdiction.

(4) A variance to a local jurisdiction's critical area program may not be granted unless:

(i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant;

(ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and

(iii) Without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the provisions of the critical area program.

(5) (i) Within 10 working days after a written decision regarding a variance application is issued, the Commission shall receive a copy of the decision from a local jurisdiction.

(ii) A local jurisdiction may not issue a permit for the activity that was the subject of the variance application until the applicable 30-day appeal period has elapsed.

(6) (i) A development activity commenced without a required permit, approval, variance, or special exception is a violation of this subtitle.

(ii) A local jurisdiction may not accept an application for a variance to legalize a violation of this subtitle, including an unpermitted structure or development activity, unless the local jurisdiction first issues a notice of violation, including assessment of an administrative or civil penalty, for the violation.

(iii) If a final adjudication of a notice of violation results in a determination that a violation has occurred, the person shall be liable for a penalty that is twice the amount of the assessment in the notice of violation, in addition to the cost of the hearing and any applicable mitigation costs.

(iv) Application for a variance under this paragraph constitutes a waiver of the right to appeal the terms of

a notice of violation and its final adjudication, including the payment of any penalties and costs assessed.

(v) If the local jurisdiction finds that the activity or structure for which a variance is requested commenced without permits or approvals and:

1. Does not meet each of the variance criteria under this subsection, the local jurisdiction shall deny the requested variance and order removal or relocation of any structure and restoration of the affected resources; or

2. Does meet each of the variance criteria under this subsection, the local jurisdiction may grant approval to the requested variance.

(7) This subsection does not apply to building permits or activities that comply with a buffer exemption plan or buffer management plan of a local jurisdiction which has been approved by the Commission.

(8) Notwithstanding any provision of a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the provisions of this subsection shall apply to, and shall be applied by, a local jurisdiction in the consideration, processing, and decision on an application for a variance.

(e) Criteria for program development; joint committee.-

(1) The Commission shall adopt by regulation on or before December 1, 1985 criteria for program development and approval, which are necessary or

appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, 1 in each of the following areas:

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;
(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

(2) During the hearing process, the Commission shall consult with each affected local jurisdiction.

(3) In accordance with its powers under § 8-1806(a) of this subtitle, the Commission may amend the criteria for program development and approval adopted under paragraph (1) of this subsection.

(f) Dredging not prevented.- Nothing in this section shall impede or prevent the dredging of any waterway in a critical area. However, dredging in a critical area is subject to other applicable federal and State laws and regulations.

(g) Initial land classification.- In adopting the initial land classification for the Atlantic Coastal Bays Critical Area, the local program:

(1) Of the Town of Ocean City shall classify as an intensely developed area that area that is within the municipal boundaries of Ocean City as of January 1, 2002; and

(2) Of Worcester County shall classify as an intensely developed area that area located on the western mainland that is east of Golf Course Road, south of Charles Street, and north of Route 707 (Old Bridge Road).

(h) Application.- The provisions of this subtitle and Title 27 of the Code of Maryland Regulations apply to the Atlantic Coastal Bays Critical Area.

§ 8-1808.2. Intrafamily transfers.

(a) Definitions.-

(1) In this section the following words have the meanings indicated.

(2) "Bona fide intrafamily transfer" means a transfer to a member of the owner's immediate family of a portion of the owner's property for the purpose of establishing a residence for that family member.

(3) "Immediate family" means a father, mother, son, daughter, grandfather, grandmother, grandson, or granddaughter.

(b) Authorize.- Notwithstanding density limitations established in criteria of the Commission, as part of its local program, a local jurisdiction may submit provisions by which an owner of a parcel of land in the

resource conservation area may be permitted to make bona fide intrafamily transfers.

(c) Permitted parcels of land.- If a local jurisdiction includes provisions for bona fide intrafamily transfers as part of its local program, the local jurisdiction shall permit a bona fide intrafamily transfer to be made only from parcels of land that:

(1) Were of record on March 1, 1986 in the Chesapeake Bay Critical Area or on June 1, 2002 in the Atlantic Coastal Bays Critical Area; and

(2) Are 7 acres or more and less than 60 acres in size.

(d) Parcels of land constitute subdivisions.- A bona fide intrafamily transfer from a parcel of land shall be a subdivision of the parcel of land that is subject to local approval under the "Subdivision Control" subtitle of Article 66B of the Code, under Title 7 of Article 28 of the Code, or under any subdivision control provisions of a charter county.

(e) Approval of subdivision of parcels.-

(1) A local jurisdiction:

(i) May approve the subdivision of a parcel of land into the number of lots indicated in this subsection by means of a bona fide intrafamily transfer; and

(ii) May not approve any greater subdivision of the parcel of land or any portion of the parcel of land.

(2) A parcel that is 7 acres or more and less than 12 acres in size may be subdivided into 2 lots.

(3) A parcel that is 12 acres or more and less than 60 acres in size may be subdivided into 3 lots. The lots may be created at different times.

(f) Approval of subdivision of parcels - Conditions of approval.-

(1) As a condition of approval, a local jurisdiction shall require that:

(i) Any deed for a lot that is created by a bona fide intrafamily transfer shall contain a covenant stating that the lot is created subject to the provisions of this section; and

(ii) A lot created by a bona fide intrafamily transfer may not be conveyed subsequently to any person other than a member of the owner's immediate family, except under procedures established pursuant to subsection (g) of this section.

(2) This subsection does not prevent the conveyance of the lot to a third party as security for a mortgage or deed of trust.

(g) Standards and procedures for subsequent conveyance of lots.- If a local jurisdiction includes provisions for bona fide intrafamily transfers as part of the local jurisdiction's local program, the local jurisdiction shall establish standards and procedures, subject to the approval of the Commission, by which the local jurisdiction will permit the subsequent

conveyance of lots to persons other than immediate family members. The standards and procedures shall assure that:

(1) The lot was created as part of a bona fide intrafamily transfer and not with the intent of subdividing the original parcel of land for purposes of ultimate commercial sale; and

(2) (i) A change in circumstances has occurred since the original transfer was made that is not inconsistent with this subtitle and that warrants an exception; or

(ii) Other circumstances that are consistent with this subtitle and with the Commission's criteria to maintain land areas necessary to support the protective uses of agriculture, forestry, open space, and natural habitats in resource conservation areas warrant an exception.

§ 8-1808.3. Lot coverage limitation.

(a) Applicability of section.-

(1) This section applies notwithstanding:

(i) Any other provision of this subtitle; or

(ii) Any criteria or guideline of the Commission adopted under this subtitle.

(2) This section may not be construed to affect a credit applicable to a stormwater management practice that is approved by the Department of the Environment.

(b) Exceptions to lot coverage in buffer area.- Lot coverage in the buffer may not exceed the minimum amount necessary for water-dependent facilities, regardless of the critical area classification or the size of the parcel or lot, except:

(1) For a buffer exemption area, as mapped or established under an approved local program;

(2) For a variance granted in accordance with this subtitle; or

(3) As provided in a waterfront revitalization area or a waterfront industrial area under a local program.

(c) Priority of section.- This section controls over any other requirement concerning lot coverage limitations in limited development areas and resource conservation areas in the critical area.

(d) Stormwater runoff.-

(1) Except as otherwise provided in this subsection for stormwater runoff, lot coverage is limited to 15% of a parcel or lot.

(2) If a parcel or lot one-half acre or less in size existed on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or before June 1, 2002 in the Atlantic Coastal Bays Critical Area, then lot coverage is limited to 25% of the parcel or lot.

(3) If a parcel or lot greater than one-half acre and less than one acre in size existed on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or

before June 1, 2002 in the Atlantic Coastal Bays Critical Area, then lot coverage is limited to 15% of the parcel or lot.

(4) Unless otherwise restricted by a local jurisdiction, lot coverage in a subdivision approved after December 1, 1985 in the Chesapeake Bay Critical Area or after June 1, 2002 in the Atlantic Coastal Bays Critical Area may not exceed 15%. However, the total lot coverage on an individual lot one acre or less in size may exceed 15%.

(e) Exemption.- This section does not apply to a trailer park that was in residential use on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or before June 1, 2002 in the Atlantic Coastal Bays Critical Area.

(f) Exceeding limits.- A local jurisdiction may allow a property owner to exceed the lot coverage limits provided in subsection (d)(2) and (3) of this section if the following conditions exist:

(1) Lot coverage associated with new development activities on the property has been minimized;

(2) For a lot or parcel one-half acre or less in size, total lot coverage does not exceed lot coverage limits in subsection (d)(2) of this section by more than 25% or 500 square feet, whichever is greater;

(3) For a lot or parcel greater than one-half acre and less than one acre in size, total lot coverage does not exceed lot coverage limits in subsection (d)(3) of this section or 5,445 square feet, whichever is greater;

(4) Water quality impacts associated with runoff from new development activities that contribute to lot coverage can be and have been minimized through site design considerations or use of best management practices approved by the local jurisdiction to improve water quality; and

(5) The property owner performs on-site mitigation as required by the local jurisdiction to offset potential adverse water quality impacts from the new development activities that contribute to lot coverage, or the property owner pays a fee to the local jurisdiction in lieu of performing the on-site mitigation.

(g) Use of fees collected.- All fees collected by a local jurisdiction under subsection (f)(5) of this section must be used to fund projects that improve water quality within the critical area consistent with the jurisdiction's local critical area protection program.

(h) Legally developed property.-

(1) In this subsection, "legally developed" means that all physical improvements ot a property:

(i) Existed before Commission approval of a local program; or

(ii) Were properly permitted in accordance with the local program and impervious surface policies in effect at the time of construction.

(2) (i) A lot or parcel legally developed as of July 1, 2008 may be considered legally nonconforming for purposes of lot coverage requirements.

(ii) For the purpose of increasing lot coverage on a lot or parcel under subparagraph (i) of this paragraph, the lot coverage limitations under this section may not be construed to apply to a development activity for which:
1. A building permit was issued before July 1, 2008; and

2. Construction was initiated and an inspection was performed before July 1, 2009.

(i) Variances.- A local jurisdiction may grant a variance from the provisions of this section in accordance with the provisions of this subtitle, regulations adopted by the Commission concerning variances as part of local program development set forth in COMAR 27.01.11, and notification of project applications set forth in COMAR 27.03.01.

§ 8-1808.4. Structures on piers.

(a) Applicability of section to Prince George's County.- This section does not apply to any project involving the construction of a dwelling unit or other non-water dependent structure on a pier located on State or private wetlands within the Critical Area in Prince George's County.

(b) "Pier" defined.-

(1) In this section, "pier" means any pier, wharf, dock, walkway, bulkhead, breakwater, piles, or other similar structure.

(2) "Pier" does not include any structure on pilings or stilts that was originally constructed beyond the landward boundaries of State or private wetlands.

(c) Applicability of section generally.- This section applies notwithstanding:

(1) Any other provision of this subtitle; and

(2) Any criteria or regulation adopted by the Commission under this subtitle.

(d) Preemption of other requirements.- This section preempts any other requirement concerning piers in the Critical Area.

(e) Building permits.-

(1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a local jurisdiction may not issue a building permit for any project involving the construction of a dwelling unit or other non-water dependent structure on a pier located on State or private wetlands within the Critical Area.

(2) This section does not prohibit or restrict a local jurisdiction from issuing a building permit for a project involving the construction of a dwelling unit or other non-water dependent structure on a pier located on State or private wetlands within the Critical Area that was issued a permit by the Secretary on or before January 1, 1989.

(3) A local jurisdiction may issue a building permit for a project involving the construction of a dwelling unit or other non-water dependent structure on a pier located on State or private wetlands within the Critical Area if:

(i) The project is constructed on a pier in existence as of December 1, 1985 that can be verified by a Department of Natural Resources aerial photograph dated 1985, accompanied by a map of the area;

(ii) The project does not require an expansion of the pier greater than 25% of the area of piers or dry docks removed on the same property; however, additional expansion may be allowed in the amount of 10% of the water coverage eliminated by removing complete piers from the same or other properties. If the horizontal surface area of a pier to be removed is not intact but the remaining pilings identify its previous size, that area may be used in determining the additional expansion permitted. The project expansion based on water coverage eliminated can be considered only if all nonfunctional piers on the property are removed except for the project pier. The total expansion may not exceed 35% of the original size of the piers and dry docks removed;

(iii) The project is approved by local planning and zoning authorities; and

(iv) The project is located in an intensely developed area, as designated in programs adopted or approved by the Critical Area Commission under this subtitle.

(4) A local jurisdiction may issue a building permit for the repair of an existing dwelling unit or other non-water dependent structure on a pier located on State or private wetlands within the Critical Area.

(5) Except for projects under paragraph (2) of this subsection, and in addition to all other provisions of this

section, all projects involving the construction of a dwelling unit or other non-water dependent facility on a pier located on State or private wetlands within the Critical Area may not be issued a building permit unless:

(i) The applicant demonstrates that the construction and operation of the project will not have a long term adverse effect on the water quality of the adjacent body of water in accordance with standards established by the local jurisdiction's critical areas program;

(ii) The applicant is required to improve the water quality of existing stormwater runoff from the project site into adjoining waters in accordance with standards established by the local jurisdiction's critical areas program; and

(iii) The applicant demonstrates that any sewer lines or other utility lines extended for the pier will not adversely affect the water quality of adjoining waters in accordance with standards established by the local jursidiction's critical areas program.

§ 8-1808.5. Community pier in buffer.

(a) "Community pier" defined.-

(1) In this section, "community pier" means a boat docking facility associated with a subdivision or similar residential area, or with condominiums, apartments, or other multiple-family dwelling units.

(2) "Community pier" does not include a private pier or a mooring.

(b) Applicability.- This section applies notwithstanding:

(1) Any other provision of this subtitle; and

(2) Any criteria or regulation adopted by the Commission under this subtitle.

(c) Requirements.- Subject to the requirements under subsection (d) of this section, a new or expanded community pier or other noncommercial boat docking or storage facility may be permitted in the buffer if:

(1) The facility:

(i) Is water dependent;

(ii) Meets a recognized private right or public need;

(iii) Is community-owned and established and operated for the benefit of the residents of a platted and recorded riparian subdivision; and

(iv) Is associated with a residential development approved by the local jurisdiction for the Critical Area and is consistent with all criteria and local regulations for the Critical Area;

(2) Adverse effects on water quality and fish, plant, and wildlife habitat are minimized;

(3) Insofar as possible, nonwater dependent structures or operations associated with water dependent projects or activities are located outside the buffer;

(4) Disturbance to the buffer is the minimum necessary to provide a single point of access to the facility;

(5) Food, fuel, or other goods and services are not offered for sale, and adequate and clean sanitary facilities are provided; and

(6) When a community pier with slips is provided as part of a new development project, private piers are not permitted in the development area.

(d) Number of slips.- The number of slips permitted at a facility shall be the lesser of the following:
(1) One slip for each 50 feet of shoreline in a subdivision located in an intense or limited development area, and one slip for each 300 feet of shoreline in a subdivision located in a resource conservation area; or

(2) A density of slips to platted lots or dwellings within a subdivision in the Critical Area in accordance with the following schedule:

Platted Lots or Dwellings in the Critical Area	Slips
Up to 15	1 for each lot
16 - 40	15 or 75%, whichever is greater
41 - 100	30 or 50%, whichever is greater
101 - 300	50 or 25%, whichever is greater
More than 300	75 or 15%, whichever is greater

(e) Variances.- A local jurisdiction may grant a variance from the provisions of this section in accordance with regulations adopted by the Commission concerning variances as part of local

program development set forth in COMAR 27.01.11 and notification of project applications set forth in COMAR 27.03.01.

(f) Local programs to be amended.- On or before December 31, 1994, a local jurisdiction shall amend its local critical area protection program to meet the provisions of this section.

§ 8-1808.6. Credits to applicants who minimize adverse impact.

(a) Applicability.-
(1) This section applies notwithstanding:

(i) Any other provisions of this subtitle;

(ii) Any criteria or guidelines adopted by the Commission under this subtitle; or

(iii) Any provision of a local program or program amendments as approved before October 1, 1995.

(2) This section applies to applicants seeking project approval of a new or expanded marina.

(b) Credits.-

(1) A local jurisdiction shall provide credit to an applicant if an applicant takes quantifiable actions, before the initiation of the development of a new or expanded marina, to minimize adverse impacts on water quality that may result from the completion of the development of the marina.

(2) Any credits provided to an applicant under paragraph (1) of this subsection shall be applied during the project approval process in assessing the degree to which:

(i) Adverse impacts to water quality of a new or expanded marina project will be minimized or avoided; and

(ii) Water quality will be improved as a result of the development of the marina project.

§ 8-1808.7. Commercial timber harvest.

(a) Authorization.- Commercial harvesting of trees by selection, or by the clear-cutting of loblolly pine and tulip poplar, may be allowed to within 50 feet of the landward edge of the mean high water line of tidal waters and perennial tributary streams, or the edge of tidal wetlands, provided that the cutting is conducted in conformity with COMAR 27.01.05 and with a buffer management plan that is prepared by a registered professional forester and is approved by the Department.

(b) Buffer management plan.- The plan shall be required for all commercial harvests within the buffer, regardless of the size of the area to be cut, and shall contain at a minimum the following requirements:

(1) Disturbance of stream banks and shorelines shall be avoided;

(2) The area disturbed or cut shall be replanted or allowed to regenerate in a manner that assures the

availability of cover and breeding sites for wildlife and reestablishes the wildlife corridor function of the buffer;

(3) The cutting may not involve the creation of logging roads and skid trails within the buffer; and

(4) Commercial harvesting practices shall be conducted to protect and conserve the habitat protection areas in accordance with COMAR 27.01.09.02, .03, .04, and .05.

§ 8-1808.8. Local critical area protection program.

(a) Atlantic Coastal Bays Critical Area.- Except as provided in subsection (b)(2) of this section, each local jurisdiction in the Atlantic Coastal Bays Critical Area shall include in its local critical area protection program provisions requiring proposed development sites in intensely developed areas to provide a forest or developed woodland cover of at least 15% after development or a fee-in-lieu payment if the fee is adequate to ensure the restoration or establishment of an equivalent forest area.

(b) Forest Conservation Act.-

(1) Except as provided in paragraph (2) of this subsection, the provisions of this subtitle replace the requirements of the Forest Conservation Act provided under Title 5, Subtitle 16 of this article within the Atlantic Coastal Bays Critical Area.

(2) Subsection (a) of this section and paragraph (1) of this subsection do not apply to:

(i) Development of a single lot for the purpose of constructing a dwelling intended for the use of the owner, or a child or grandchild of the owner, if the development does not result in the cutting, clearing, or grading of more than 40,000 square feet of forest, and the lot was legally recorded prior to July 31, 1994; or

(ii) A single lot that is part of a project that has otherwise complied with the Forest Conservation Act.

(3) For purposes of subsection (a) of this section, forest or developed woodland cover may include trees, woody plants, and shrubs, and any landscaping under an approved landscaping plan.

(c) Additional provisions.- Each local jurisdiction in the Atlantic Coastal Bays Critical Area may include in its local critical area protection program:

(1) As part of compliance with the stormwater management requirements of Title 27 of the Code of Maryland Regulations and Title 4, Subtitle 2 of the Environment Article, a provision encouraging the use of bioretention for redevelopment in intensely developed areas;

(2) A provision applying buffer requirements to tributary streams located outside the critical area and within the Atlantic Coastal Bays Watershed that are noted as perennial and intermittent streams in the Atlantic Coastal Bays Watershed and that are so noted on the most recent U.S. Geological Survey 7-1/2 minute topographic quadrangle maps (scale 1:24,000) or on more detailed maps or studies at the discretion of the local jurisdiction; and

(3) To the extent otherwise permitted by law, a provision regarding improvements over State or private wetlands, including criteria for the protection of water quality and fish, wildlife, and plant habitats, and the use and construction of private and community piers in the local jurisdiction.

(d) Assistance by Department.- On request, the Department shall assist a local jurisdiction in the preparation of:

(1) Any more detailed maps or studies necessary to implement the buffer provisions under subsection (c)(2) of this section; and

(2) The wetland protection provisions under subsection (c)(3) of this section.

(e) Agricultural activities permitted under certain circumstances.- If a local jurisdiction adopts provisions consistent with subsection (c)(2) of this section, agricultural activities are permitted in the buffer outside the critical area and in the Atlantic Coastal Bays Watershed that are in accordance with Title 27 of the Code of Maryland Regulations under an approved soil conservation and water quality plan.

§ 8-1808.9. Provisions applying a buffer to perennial and intermittent streams.

(a) Application.- The provisions of this section apply to a local jurisdiction that is located in the Atlantic Coastal Bays Watershed and not in the Atlantic Coastal Bays Critical Area.

(b) Written statement of intent.- On or before July 15, 2002, a local jurisdiction subject to the provisions of this section shall submit to the Commission a written statement of its intent either:

(1) To adopt provisions applying a buffer to perennial and intermittent streams that are within the boundaries of the local jurisdiction and are noted on the most recent U.S. Geological Survey 7-1/2 minute topographic quadrangle maps (scale 1:24,000) or on more detailed maps or studies at the discretion of the local jurisdiction; or

(2) Not to adopt the provisions.

(c) Submission of provisions.- If a local jurisdiction states the local jurisdiction's intent to adopt provisions meeting the requirements of this section, the local jurisdiction shall submit the provisions to the Commission and adopt the provisions in accordance with the schedule of submissions for the Atlantic Coastal Bays Critical Area program set forth under § 8-1809 of this subtitle.

§ 8-1808.10. Minimum buffer.

(a) Scope.- This section applies to an application for subdivision or site plan approval within the resource conservation area that:

(1) Receives final local approval on or after July 1, 2008, unless an application for subdivision or site plan approval is submitted before July 1, 2008 and legally recorded by July 1, 2010; and

(2) Does not involve the use of growth allocation.

(b) In general.-

(1) Except as provided under subsection (c) of this section, the minimum buffer shall be:

(i) 200 feet from tidal waters or a tidal wetland; and

(ii) 100 feet from a tributary stream.

(2) All provisions under COMAR 27.01.09.01 that are applicable to development activities within the 100-foot buffer, including the establishment of vegetation and expansion requirements, shall apply to the 200-foot buffer.

(c) Reduction of buffer.- The 200-foot buffer may be reduced if:

(1) The strict application of the minimum 200-foot buffer would preclude:

(i) Subdivision of the property at a density of one dwelling unit per 20 acres, and all other State and local requirements will be satisfied; or

(ii) An intra-family transfer authorized under § 8-1808.2 of this subtitle; and

(2) The reduction will occur in accordance with local program procedures approved by the Commission.

§ 8-1809. Approval and adoption of program.

(a) Statements of intent.-

(1) Within 45 days after the criteria adopted by the Commission under § 8-1808 of this subtitle become effective, each local jurisdiction shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

(2) On or before July 15, 2002, each local jurisdiction in the Atlantic Coastal Bays Critical Area shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Atlantic Coastal Bays Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

(b) Commission may adopt program.- If a local jurisdiction states the local jurisdiction's intent not to develop a program or fails to submit a timely statement of intent, the Commission shall prepare and adopt a program for the part of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in that local jurisdiction.

(c) Submission of locally developed program.-

(1) If a local jurisdiction states the local jurisdiction's intent to develop a Chesapeake Bay Critical Area program, the local jurisdiction shall prepare a proposed program and submit the program to the Commission within 270 days after the effective date of the criteria adopted under § 8-1808 of this subtitle. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 180 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least 1 public hearing on the proposed program, for which 2 weeks notice shall be published in a newspaper of general circulation in the local jurisdiction.

(2) If a local jurisdiction states the local jurisdiction's intent to develop an Atlantic Coastal Bays Critical Area program, the local jurisdiction shall prepare a proposed program meeting the requirements of the criteria adopted under § 8-1808 of this subtitle and submit the program to the Commission on or before January 1, 2003. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 30 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least 1 public hearing on the proposed program, for which 2 weeks' notice shall be published in a newspaper of general circulation in the local jurisdiction.

(d) Public hearing; approval by Commission.-

(1) Within 30 days after a program is submitted, the Commission shall appoint a panel of 5 of its members to conduct, in the affected jurisdiction, a public hearing on the proposed program.

(2) (i) Within 90 days after the Commission receives a proposed Chesapeake Bay Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(ii) Within 60 days after the Commission receives a proposed Atlantic Coastal Bays Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(3) A changed proposal shall be submitted to the Commission in the same manner as the original proposal, within 40 days after the Commission's notice. Unless the Commission approves a changed proposal or disapproves a changed proposal and states in writing the reasons for the Commission's disapproval within 40 days, the changed proposal shall be deemed approved.

(e) Adoption of program.- Within 90 days after the Commission approves a proposed Chesapeake Bay Critical Area program or a proposed Atlantic Coastal Bays Critical Area program, the local jurisdiction shall hold hearings and adopt the program in accordance with legislative procedures for enacting ordinances. If the governing body of the local jurisdiction wishes to change any part of the approved proposal before adoption, the governing body shall submit the proposed change to the Commission for approval. Unless the Commission approves the change or disapproves the change and states in writing the reasons for the Commission's disapproval within 30 days after the Commission receives the change, the change shall be deemed approved. A changed part may not be adopted until the changed part is approved by the Commission.

(f) Programs effective within 760 days.-

(1) Within 760 days after criteria adopted by the Commission become effective, there shall be in effect throughout the Chesapeake Bay Critical Area programs approved or adopted by the Commission.

(2) On or before September 29, 2003, there shall be in effect throughout the Atlantic Coastal Bays Critical Area programs approved or adopted by the Commission.

(g) Review and proposed amendment of entire program.- Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every 6 years. Each local jurisdiction shall send in

writing to the Commission, within 60 days after the completion of its review, the following information:

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

(h) Proposed program amendments and refinements.-

(1) As often as necessary but not more than 4 times per calendar year, each local jurisdiction may propose program amendments and program refinements to its adopted program.

(2) (i) Except for program amendments or program refinements developed during program review under subsection (g) of this section, a zoning map amendment may be granted by a local approving authority only on proof of a mistake in the existing zoning.

(ii) The requirement in paragraph (2)(i) of this subsection that a zoning map amendment may be granted only on proof of a mistake does not apply to proposed changes to a zoning map that:

1. Are wholly consistent with the land classifications in the adopted program; or

2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.

(i) Program not to be amended without approval of Commission.- A program may not be amended except with the approval of the Commission.

(j) Standards for approval by Commission.- The Commission shall approve programs and program amendments that meet:

(1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and

(2) The criteria adopted by the Commission under § 8-1808 of this subtitle.

(k) Program to be available for public inspection.- Copies of each approved program, as the program is amended or refined from time to time, shall be maintained by the local jurisdiction and the Commission in a form available for public inspection.

(l) Correction of clear mistakes, omissions, or conflicts with criteria or laws.-

(1) If the Commission determines that an adopted program contains a clear mistake, omission, or conflict with the criteria or law, the Commission may:

(i) Notify the local jurisdiction of the specific deficiency; and

(ii) Request that the jurisdiction submit a proposed program amendment or program refinement to correct the deficiency.

(2) Within 90 days after being notified of any deficiency under paragraph (1) of this subsection, the local jurisdiction shall submit to the Commission, as program amendments or program refinements, any proposed changes that are necessary to correct those deficiencies.

(3) Local project approvals granted under a part of a program that the Commission has determined to be deficient shall be null and void after notice of the deficiency.

(m) Regulations.-

(1) The Commission may adopt regulations that prescribe the procedures and information requirements for program amendments and program refinements.

(2) In the absence of regulations under paragraph (1) of this subsection, a local jurisdiction may propose changes to adopted programs. Within 10 working days of receiving a proposal under this paragraph, the Commission shall:

(i) Mail a notification to the local jurisdiction that the proposal has been accepted for processing; or

(ii) Return the proposal as incomplete.

(n) Specification of change as amendment or refinement.- A local jurisdiction may specify whether it intends a proposed change to be a program amendment

or program refinement. However, the Commission shall treat a proposed change as a program amendment unless the chairman determines that the proposed change is a program refinement.

(o) Adoption of proposed amendment.-

(1) For proposed program amendments, a Commission panel shall hold a public hearing in the local jurisdiction, and the Commission shall act on the proposed program amendment within 130 days of the Commission's acceptance of the proposal. If action by the Commission is not taken within 130 days, the proposed program amendment is deemed approved.

(2) The Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of this subtitle, and all criteria of the Commission.

(3) In accordance with the Commission's determination in paragraph (2) of this subsection, the Commission shall:

(i) Approve the proposed program amendment and notify the local jurisdiction;

(ii) Deny the proposed program amendment;

(iii) Approve the proposed program amendment subject to one or more conditions; or

(iv) Return the proposed program amendment to the local jurisdiction with a list of the changes to be made.

(4) If the Commission approves a proposed program amendment subject to one or more conditions under item (3)(iii) of this subsection, the local jurisdiction shall notify the Commission within 60 days of its intent to adopt the conditions.

(5) The local jurisdiction shall incorporate the approved program amendment and any required conditions into the adopted program within 120 days of receiving notice from the Commission that the program amendment has been approved.

(p) Adoption of proposed refinement.-

(1) Proposed program refinements shall be determined as provided in this subsection.

(2) (i) Within 30 days of the Commission's acceptance of a proposal to change an adopted program, the chairman, on behalf of the Commission, may determine that the proposed change is a program refinement. Immediately upon making a determination under this paragraph, the chairman shall notify the Commission of that determination.

(ii) If a proposed change that was specifically submitted as a program refinement is not acted on by the chairman within the 30-day period, the Commission shall notify the appropriate local jurisdiction that the proposed change has been deemed to be a program amendment.

(3) (i) The Commission may vote to override the chairman's determination only at the first Commission

meeting where a quorum is present following the chairman's determination.

(ii) If the chairman's determination is overridden, the proposed change is deemed a program amendment, which shall be decided by the Commission in accordance with the procedures for program amendments provided in this section, except that the Commission shall act on the program amendment within 60 days after a vote to override the chairman.

(iii) If the chairman's determination is not overridden, within 10 working days after the opportunity to override the chairman's decision under item (i) of this paragraph, the chairman, on behalf of the Commission, shall:

1. Determine if the program refinement is consistent with the purposes, policies, goals, and provisions of this subtitle, and all criteria of the Commission; and

2. A. Approve the proposed program refinement and notify the local jurisdiction;

B. Deny the program refinement;

C. Approve the proposed program refinement subject to one or more conditions; or

D. Return the proposed program refinement back to the local jurisdiction with a list of the changes to be made.

(iv) If the Commission approves a proposed program refinement subject to one or more conditions under

item (iii)3 of this paragraph, the local jurisdiction shall notify the Commission within 60 days of its intent to adopt the conditions.

(4) A local jurisdiction shall incorporate an approved program refinement and any required conditions into its adopted program within 120 days of receiving notice from the chairman that the program refinement has been approved.

(q) Combination of amendments or refinements for approval of project.-

(1) (i) As necessary, a local jurisdiction may combine any or all proposed program amendments or program refinements required for a specific project approval into a single request to the Commission for program amendment, program refinement, or both.

(ii) The Commission shall ensure that any requests received in accordance with this paragraph are consistent with the purposes, policies, goals, and provisions of this subtitle, and all criteria of the Commission.

(2) A project for which a local jurisdiction requests growth allocation may be submitted as a proposed program amendment, program refinement, or both.

(3) Approval by the Commission of a program amendment, program refinement, or both does not affect the Commission's authority to receive notice of or intervene in a project approval that was not specifically approved by the Commission as part of its approval of a program amendment or program refinement.

(r) Adoption of amended criteria.- Within 6 months after the adoption of amended criteria, a local jurisdiction shall send to the Commission:

(1) Proposed program amendments or program refinements that address the amended criteria; or

(2) A statement describing how the adopted program conforms to the amended criteria and certifying that the adopted program is consistent with the amended criteria.

(s) Regulations concerning use of growth allocation.- If the Commission adopts a regulation concerning the use of the growth allocation, any use of the growth allocation must be in accordance with that regulation for the change to be considered a program refinement.

[1984, ch. 794; 1986, ch. 601; 1987, ch. 11, § 1; 1990, ch. 6, § 2; ch. 649, § 2; 1993, ch. 5, § 1; 2002, chs. 431, 432, 433; 2006, ch. 55; 2008, ch. 119, § 1.]

§ 8-1810. Programs adopted by Commission.

(a) When Commission to adopt program.- If a local jurisdiction fails to notify the Commission that the local jurisdiction will develop a program, fails to submit a proposed program or changed proposal on time, or fails to obtain Commission approval of a proposed program or changed proposal that is submitted, the Commission shall prepare and adopt a program that satisfies the criteria adopted under § 8-1808 of this subtitle for the part of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in that local jurisdiction.

(b) Public hearing; Commission program to supersede local law.- Where a local jurisdiction fails to adopt or obtain Commission approval of a program, the Commission shall adopt a program for that jurisdiction by adopting regulations in accordance with Title 2, Subtitle 5 (Joint Committee on Administrative, Executive, and Legislative Review) and Title 10, Subtitle 1 (Administrative Procedure Act) of the State Government Article. Before the full Commission adopts a program under this subsection, the Commission shall appoint a panel of 3 of the Commission's members to conduct in the affected jurisdiction at least 2 public hearings at least 10 days apart on the proposed program, for which 2 weeks notice shall be published in a newspaper of general circulation in the local jurisdiction. A program adopted by the Commission under this subsection shall supersede any inconsistent local laws, ordinances, or plans.

(c) Local jurisdictions to enforce.- If the Commission adopts a program for a local jurisdiction, the program shall be implemented and enforced by local authorities in the same manner as if the program had been adopted by the local jurisdiction itself.

(d) Local program to supersede Commission program.- If, at any time after the Commission has adopted a program for a local jurisdiction, the local jurisdiction submits an alternative program of its own that satisfies the criteria adopted under § 8-1808 of this subtitle and is approved by the Commission, the alternative program supersedes the program adopted by the Commission.

[1984, ch. 794; 1990, ch. 6, § 2; 2002, ch. 433; 2003, ch. 21, § 1.]

§ 8-1811. Project approval.

(a) Project consistent with program.- From the effective date of a program approved or adopted by the Commission, a project approval that involves land located in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area may not be granted unless the project approval is consistent and complies with the program.

(b) Projects requiring notice to Commission.-

(1) The Commission shall adopt regulations identifying those classes of applications for project approval of which the Commission wishes to receive notice.

(2) From the date designated by the Commission in approving or adopting a program, an applicant for project approval or the local agency authorized to grant project approval on an application in any of the identified classes shall send to the Commission in accordance with the regulations and any other instructions of the Commission, a copy of every pending or new application for approval that is in any of the identified classes. Before the close of the fifth business day after receipt of a copy of an application from the applicant or the local approving authority, the Commission shall send written notice of receipt to the applicant and to the local approving authority. A failure of the Commission to send a timely notice shall render paragraph (3) of this subsection inapplicable as to that application.

(3) The local approving authority may not process an application of which a copy must be sent to the Commission until the local approving authority has received notice of receipt from the Commission, and any action of the local approving authority in violation of this paragraph shall be void.

§ 8-1812. Commission chairman; authority regarding judicial proceedings.

(a) In general.- After the Commission has approved or adopted a program, the chairman of the Commission has standing and the right and authority to initiate or intervene in any administrative, judicial, or other original proceeding or appeal in this State concerning a project approval in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area. The chairman may exercise this intervention authority without first obtaining approval from the Commission, but the chairman shall send prompt written notice of any intervention or initiation of action under this section to each member of the Commission. The chairman shall withdraw the intervention or action initiated if, within 35 days after the date of the chairman's notice, at least 13 members indicate disapproval of the action, either in writing addressed to the chairman or by vote at a meeting of the Commission. A member representing the local jurisdiction affected by the chairman's intervention or action may request a meeting of the Commission to vote on the chairman's intervention or action.

(b) Rules of procedure.- Except as stated in this subtitle, the chairman is subject to general laws and

rules of procedure that govern the time within and manner in which the authority granted in subsection (a) of this section may be exercised.

(c) Appeal authorized.- The chairman may appeal an action or decision even if the chairman was not a party to or is not specifically aggrieved by the action or decision.

§ 8-1813. Prior project approval.

(a) Specific findings required - June 1, 1984.- From June 1, 1984 with regard to any subdivision plat approval or approval of a zoning amendment, variance, special exception, conditional use permit, or use of a floating zone, affecting any land or water area located within the initial planning area identified in § 8-1807(a) of this subtitle, for which application is completed after that date, the approving authority of the local jurisdiction in rendering its decision to approve an application shall make specific findings that:

(1) The proposed development will minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands; and

(2) The applicant has identified fish, wildlife, and plant habitat which may be adversely affected by the proposed development and has designed the development so as to protect those identified habitats whose loss would substantially diminish the continued ability of populations of affected species to sustain themselves.

(b) Specific findings required - On or after June 1, 2002.- On or after June 1, 2002, with regard to any subdivision plat approval or approval of a zoning amendment, variance, special exception, conditional use permit, or use of a floating zone, affecting any land or water area located within the initial planning area identified in § 8-1807(b) of this subtitle, for which application is completed after that date, the approving authority of the local jurisdiction in rendering its decision to approve an application shall make specific findings that:

(1) The proposed development will minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands; and

(2) The applicant has identified fish, wildlife, and plant habitat which may be adversely affected by the proposed development and has designed the development so as to protect those identified habitats whose loss would substantially diminish the continued ability of populations of affected species to sustain themselves.

(c) Information required from applicant.- With regard to any application for project approval described in subsection (a) or (b) of this section, a local approving authority shall require any additional information from an applicant as is necessary in order to make the findings required by subsection (a) or (b) of this section.

(d) Section in effect until program effective.- This section shall remain in effect in a local jurisdiction until such time as an approved program becomes effective.

(e) Exception.- This section does not apply to any application in the Chesapeake Bay Critical Area initially filed prior to March 1, 1984 or any application in the Atlantic Coastal Bays Critical Area filed prior to June 1, 2002.

§ 8-1813.1. Single family dwelling; definitions; alternative buffer.

(a) Single family dwelling - On date of program approval.- Except as provided in subsections (b), (c), and (d) of this section, a local jurisdiction in the Atlantic Coastal Bays Critical Area shall permit a single lot or parcel of land that was legally of record on the date of program approval to be developed with a single family dwelling, if a dwelling is not already placed there, notwithstanding that such development may be inconsistent with the approved density provisions of the approved local program, provided that:
(1) The local jurisdiction develops, as part of its program, procedures to bring the lots or lands into conformance with the local critical area program to the extent possible, including the consolidation or reconfiguration of lots not individually owned; and

(2) The procedures developed in accordance with item (1) of this subsection are approved by the Commission.

(b) Single family dwelling - Prior to program approval.- Land that was subdivided into recorded and legally buildable lots for which the subdivision received the local jurisdiction's final approval after June 1, 2002 but prior to program approval may be developed with a single family dwelling, if a single family dwelling is not already placed there, provided that:

(1) Development of the land conforms to the requirements of this title and Title 27 of the Code of Maryland Regulations; or

(2) The area of land is deducted from the local jurisdiction's growth allocation in accordance with § 8-1808.1(b) of this subtitle and COMAR 27.01.02.06.

(c) Definitions.-

(1) (i) In this subsection and subsection (d) of this section the following words have the meanings indicated.

(ii) "Bayside mixed use district" means a district of existing large bayside parcels that:

1. Are essentially undeveloped with permanent structures;

2. Are suitable for large-scale commercial or mixed use development; and

3. Offer the opportunity for well-planned, efficient, and diversified comprehensive development.

(iii) 1. "Planned unit development" means a development comprised of a combination of land uses or varying intensities of the same land use in accordance with an integrated plan that provides flexibility in land use design approved by the local jurisdiction.

2. "Planned unit development" includes a residential planned community.

(2) A planned unit development in a bayside mixed use district that has received the local jurisdiction's final site approval and is legally buildable after June 1, 2002 but prior to program approval may be developed if:

(i) Development of the land conforms to the requirements of this title and Title 27 of the Code of Maryland Regulations;

(ii) The area is deducted from the local jurisdiction's growth allocation in accordance with § 8-1808.1(b) of this subtitle and COMAR 27.01.02.06; or

(iii) The land:

1. Is designated as an intensely developed area;

2. Is exempted from the buffer designation in COMAR 27.01.09; and

3. Is part of a project that complies with Title 4, Subtitle 2 of the Environment Article.

(d) Alternative buffer provision.- A local jurisdiction may include in the jurisdiction's local critical area protection program, to be approved by the Commission, an alternative buffer provision for the development of a planned unit development in accordance with the planned unit development's Step III approval, provided that:

(1) The planned unit development received Step III approval from the local jurisdiction prior to June 1, 2002;

(2) The planned unit development has received the local jurisdiction's final subdivision approval and is legally buildable after June 1, 2002 but prior to program approval;

(3) The area is deducted from the local jurisdiction's growth allocation in accordance with § 8-1808.1(b) of this subtitle and COMAR 27.01.02.06, if applicable;

(4) The provision includes measures that protect water quality and fish, wildlife, and plant habitats in accordance with the intent of this subtitle and Title 27 of the Code of Maryland Regulations; and

(5) At least 75% of the dwelling units in the planned unit development comply with the buffer requirements in COMAR 27.01.09.01 and no dwelling unit has a buffer of less than 50 feet from existing or proposed tidal waters, tidal wetlands, or tributary streams.

(e) Determination.- For purposes of implementing this subtitle, a local jurisdiction in the Atlantic Coastal Bays Critical Area shall have determined, based on land uses and development in existence on June 1, 2002, which land areas fall into the three types of development areas in accordance with Title 27 of the Code of Maryland Regulations.

§ 8-1814. Commission approval of certain projects; applicability of other laws.

(a) Approval of local agency projects.- After 760 days have elapsed from the date upon which criteria adopted by the Commission become effective, any State or local agency that proposes development which has not been

subject to project approval by the local jurisdiction under an approved program, including buildings, treatment plants, roads, railroads, and airports, in the Chesapeake Bay Critical Area shall, before the State or local agency begins the development, receive the approval of the Commission in accordance with procedures or exceptions set forth in regulations adopted by the Commission using the standards set forth in § 8-1808(b)(1) through (3) of this subtitle. These regulations shall be adopted on or before September 1, 1987, and only after consultation with affected State and local agencies.

(b) Consistency determinations.- The Secretary shall consult with the Commission in making consistency determinations under the Federal Coastal Zone Management Program.

(c) Applicability of other laws.- This subtitle is not intended to relieve any obligation otherwise imposed by law or regulation to obtain licenses, permits, or approvals from State and local regulatory agencies or to comply with applicable State and local regulatory prohibitions or restrictions.

§ 8-1815. Enforcement.

(a) Entry onto property to identify or verify suspected violation;violators subject to prosecution or suit.-

(1) (i) Except as otherwise authorized in a local jurisdiction, in accordance with the procedures set forth in subparagraph (ii) of this paragraph, a local authority may obtain access to and enter a property in order to identify or verify a suspected violation, restrain a

development activity, or issue a citation if the local authority has probable cause to believe that a violation of this subtitle or the local program has occurred, is occurring, or will occur.

(ii) 1. A local authority shall make a reasonable effort to contact a property owner before obtaining access to or entering the property.

2. If entry is denied, the local authority may seek an injunction to enter the property to pursue an enforcement action.

(iii) 1. A local authority that identifies a violation of this subtitle or of the local program shall take enforcement action.

2. The local authority shall require appropriate restoration and mitigation as necessary to offset adverse impacts to the critical area resulting from the violation.

3. A. For restoration or mitigation that exceeds 1,000 square feet or involves expenses exceeding $1,000, the local authority shall collect a bond or other financial security or adopt appropriate procedures to ensure that the restoration or mitigation is properly completed.

B. If the restoration or mitigation involves planting, the bond shall be held for at least 2 years after the date the plantings were installed to ensure plant survival.

C. On request of the property owner, the local authority shall schedule inspections as necessary to ensure

compliance and the return of the bond or other financial security.

(2) (i) A person who violates a provision of an order, permit, plan, local program, this subtitle, or regulations adopted, approved, or issued under the authority of this subtitle shall be:

1. Subject to prosecution or suit in circuit court or district court by the chairman or local authorities, who may invoke the sanctions and remedies afforded by State or local law;

2. Guilty of a misdemeanor; and

3. On conviction in a court of competent jurisdiction, subject to a fine not exceeding $10,000 or imprisonment not exceeding 90 days or both, with costs imposed in the discretion of the court.

(ii) A criminal prosecution or a suit for a civil penalty for violation of a provision of an order, permit, plan, local program, this subtitle, or regulations adopted, approved, or issued under the authority of this subtitle shall be instituted within 3 years after the Commission or the local authorities in fact knew or reasonably should have known of the violation.

(3) A local authority may request:

(i) Assistance from the Commission in an enforcement action; or

(ii) That the chairman refer an enforcement action to the Attorney General.

(b) Referral to Attorney General.- Whenever the chairman has reason to believe that a local jurisdiction is failing to enforce the requirements of a program applicable to a particular development, the chairman shall serve notice upon the local enforcement authorities. If within 30 days after service of the notice, the local authorities have failed to initiate an action to remedy or punish the violation, the chairman may refer the matter to the Attorney General.

(c) Sanctions - Remedies available to local jurisdiction.- Upon referral of an alleged violation under subsection (a) or (b) of this section, the Attorney General may invoke any sanction or remedy available to local authorities, in any court of competent jurisdiction in which the local authorities would be authorized to prosecute or sue the violator.

(d) Sanctions - Equitable remedies.- In addition to any other sanction or remedy available, the Attorney General may bring an action in equity to compel compliance or restrain noncompliance with the requirements of approved project plans, and to compel restoration of lands or structures to their condition prior to any modification which was done in violation of approved project plans.

(e) Action to restrain violation.- Notwithstanding any other provision of this section, whenever a development in the Critical Area is proceeding in violation of approved project plans and threatens to immediately and irreparably degrade the quality of tidal waters or fish, wildlife, or plant habitat, the Attorney General, upon request of the chairman, may bring an action to

restrain the violation and, as appropriate, to compel restoration of any land or water areas affected by the development.

TITLE 14. GAS AND OIL

SUBTITLE 5. COASTAL FACILITIES REVIEW ACT

§ 14-501. Definitions.

(a) In general.- In this subtitle the following words have the meanings indicated.

(b) Coastal area.- "Coastal area" means all that land and water area lying within Anne Arundel, Baltimore, Calvert, Caroline, Cecil, Charles, Dorchester, Harford, Kent, Prince George's, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester counties, the Chesapeake Bay, and lying seaward to the State's territorial jurisdiction.

(c) Construction.- "Construction" means any clearing, grading, excavation, building or other action that would affect the natural environment of the coastal area, or the commencement of any of these activities. This does not include any activity for the sole purpose of securing biological or geological data or other data for an economic or environmental analysis.

(d) Department.- "Department" means the Department of the Environment.

(e) Facility.- "Facility" means:

(1) Any pipeline carrying crude oil or natural gas ashore from offshore sources;
(2) Any intermediate production terminal or refinery which is designed to process at least ten thousand barrels of crude oil per calendar day;

(3) Any crude oil storage facility:

(i) Whose total design capacity is at least 100,000 barrels;

(ii) Which occupies at least fifty acres; or

(iii) Whose average throughput is at least ten thousand barrels per calendar day;

(4) Any facility for the processing, transmission, or storage of natural gas with a total design capacity for at least one billion cubic feet of gas for storage or two hundred million cubic feet for processing;

(5) Any operations base which:

(i) Includes port and harbor facilities;

(ii) Occupies at least twenty-five acres; and

(iii) Is designed, constructed and operated as an assembly area for the storage, handling, and transport of supplies whose next and final destination is any oil and/or gas exploration, development, or production-related operation conducted in the territorial sea, contiguous zone or high seas area; or

(6) Any fabrication yard which is an assembly operation used for the construction or preparation of petroleum drilling rigs, jackets or platforms, or wellhead installations, whose final destination is installation or operation in the territorial sea, contiguous zone, or high seas area.

(f) Government agencies.- "Government agencies" means the government of the United States, the State of Maryland, or any other state, their political subdivisions, units, or instrumentalities thereof, and interstate units.

(g) Person.- "Person" includes corporations, companies, associations, firms, partnerships, and joint stock companies, as well as individuals and government agencies.

(h) Secretary.- "Secretary" means the Secretary of the Environment.

§ 14-502. Legislative findings and intent; citation of subtitle.

(a) Coastal area as unique and valuable resource.- Maryland's coastal area, which borders the Atlantic Ocean and the Chesapeake Bay, is rich in a variety of natural, commercial, recreational, industrial, and esthetic resources. These resources possess great immediate as well as potential value for the State and the nation as a whole. However, the coastal area and the fish, shellfish, and other living marine resources and wildlife contained therein are ecologically fragile. They constitute a unique, irreplaceable, natural, and esthetic resource of great economic value.

(b) Balancing competing demands.- Extraction of mineral resources and fossil fuels from the Baltimore Canyon Trough and elsewhere may create immediate, increasing, and competing demands upon the lands and waters of the State's coastal area. The interests of the State and the nation require a method of resolving these competing demands which will give a high priority to the natural systems of the coastal zone and promote the public health, safety and welfare.

(c) Assessment of facility impact.- Certain facilities associated with extraction and refining of mineral and fossil fuel resources may adversely affect the State's interest if they are located in the coastal area without an adequate planning of their impact and without sufficient safeguards. The State, therefore, requires a system of assessing the economic, fiscal, social, cultural, and environmental impacts associated with the establishment of such facilities, as a lack of proper assessment may cause irreparable damage to the integrity of the coastal area if these facilities are established in the coastal area.

(d) Coastal zone management plan.- Meeting the energy requirements of the State and nation and planning for the proper use or development of the coastal area is imperative. To that end the State is developing a coastal zone management plan, pursuant to the federal Coastal Zone Management Act of 1972, which will recommend permissible land and water uses within the coastal zone and which must provide for adequate consideration of the national interest in the siting of facilities necessary to meet requirements which are other than local in nature, and which must further provide for a method of assuring that local land

and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit. It is in the State's interest that all parties including all units of State government, county government, the federal government, business, industry, and the public at large participate in planning the uses for Maryland's coastal area. The completion of the plans will enable Maryland to properly use, develop, and protect the coastal area.

(e) Role of local, State and national governments.- Without adequate planning, the establishment of certain oil-related facilities in the coastal area may have an immediate impact on the environmental, economic, fiscal, social and cultural well-being of the people residing in the area where these facilities are established. Therefore, local concern should be reflected in making decisions as to location of these facilities and to that end, county governments should be actively involved in the planning for the coastal areas. If, however, the extent of oil-related facilities contemplated affects environmental, economic, social, and cultural factors beyond the borders of the particular subdivision involved, in addition to involving potential expenditure of State funds in excess of tax revenues derived from the facilities, then the State interest and the national interest become a factor in the consideration of where these oil-related facilities shall be located.

(f) National public interest.- The national public interest in assuring adequate facilities for the production of energy resources requires that the State and local governments promptly and expeditiously assess the impact of these facilities and determine, at

the earliest practicable time, whether to grant necessary State and local authorizations.

(g) Citation.- The foregoing subsections constitute the findings and intent of the General Assembly in enacting provisions for comprehensive State review prior to permitting the establishment of certain facilities within Maryland's coastal area, and to that end this subtitle may be cited as the "Coastal Facilities Review Act".

§ 14-503. Permit for construction of facility - Required; exemption as to facilities begun or in existence prior to July 1, 1975; rules and regulations.

(a) Permit required; exemption.- A person may not construct, or cause to be constructed, a facility in the coastal area unless he first obtains a permit pursuant to this subtitle. However, facilities for which on-site construction, excluding site preparation, has legally begun prior to July 1, 1975 are exempt from the provisions of this subtitle.

(b) Rules and regulations.- The Secretary after receiving the advisory comments of the Secretaries of Natural Resources, Business and Economic Development, and Transportation and the Secretary of the Department of Planning may adopt rules and regulations to implement the provisions of this subtitle.

§ 14-504. Permit for construction of facility - Application generally; information to accompany application; fees; cooperation of State units and departments.

(a) Application; accompanying information.- Any person proposing to construct a facility in the coastal area shall file an application with the Department in the form the Secretary prescribes. The application shall be accompanied by the information the Secretary requires and shall include the following information:

(1) A project description specifying:

(i) What is planned to be constructed, its purpose, use, location, cost, and size; and

(ii) The methods of construction, construction schedule, and operation procedure.

(2) A list of all licenses, permits or other approvals required by any government unit.

(3) All information necessary or required for any application to the State or any of its units or departments, for any other permit, license or approval required for or in connection with the facility.

(4) Detailed information as to the need for the facility and facts concerning alternate site locations as may be requested by the Secretary.

(b) Fees.- The Department shall establish a reasonable fee schedule to reimburse the Department for the costs of filing and processing of an application required by this subtitle. The fee shall include at least the cost of the statement required by § 14-506 of this subtitle, payable in advance of any required State expenditure.

(c) Cooperation of State units and departments.- All units and departments of the State shall, to the fullest extent possible, cooperate with any person proposing to construct a facility in the coastal area by supplying the person with information and assistance as he may request.

§ 14-505. Permit for construction of facility - Effect of application and action taken thereon.

Notwithstanding any contrary provisions of this article, an application for a permit required by this subtitle shall be considered an application for all other permits or licenses required under this article for the facility and the action taken by the Secretary on the application shall be deemed to be action taken on all other permits and licenses, including wetlands licenses.

§ 14-506. Permit for construction of facility - Impact statement required; advisory comments from certain State departments; county action prerequisite to processing application, etc.

(a) Impact statement required.- Upon the filing of an application and prior to deciding whether or not to grant the permit, a statement of the economic, fiscal, and environmental impact of the proposed facility shall be prepared by one or more appropriate parties selected by the Secretary after receiving the advisory comments of the Secretaries of Natural Resources, Business and Economic Development, and Transportation and the Director of Planning. The statement shall be prepared and filed within six months after selection of the appropriate party or parties. The statement, with written background and supporting

material, shall be available to the public. The time for filing the statement may be extended by the Secretary for up to but not more than an additional 12 months for good cause.

(b) Contents of statement.- The statement shall include, but not be limited to, the following:

(1) An inventory of existing economic and environmental conditions at the project site and in the immediate area;

(2) A project description of what is to be constructed, and the manner and construction schedule and the method of construction;

(3) A complete description of the proposed facility including at least its anticipated size, effluent load, and production levels;

(4) An assessment of the probable economic, fiscal, and environmental impact of the project upon the natural environment of the project site coastal area and the immediate area;

(5) Recommendations for minimizing any adverse economic, fiscal, or environmental impacts;

(6) An evaluation of the need for the facility and the relative merit of other possible sites; and

(7) In the case of a refinery, a description of the manner of transportation of the feed stock and the product of the crude oil.

(c) County action prerequisite to processing application.- The application shall not be processed further nor shall the analysis required be undertaken until the county government wherein the facility is proposed to be located or wherein the pipeline will terminate, has certified to the Department that all local land use classifications, including zoning, special exceptions, variances or conditional uses, necessary for the location and operation of the proposed facility have been or will be granted. If the county government in its discretion stays the certification and so notifies the Department that it will continue its stay until the analysis is completed then, and only in that event may the application be processed and the analysis prepared as set forth under this subtitle.

§ 14-507. Permit for construction of facility - Prerequisites to further action by Secretary; public hearing required; information to be made available to public; notice of hearing.

(a) Prerequisites to further action by Secretary.- Further action may not be taken by the Secretary under this subtitle without completion of the statement required under § 14-506 of this subtitle, and its being made available to the public, and until the county government, where the proposed facility is to be located has certified to the Department that all necessary local approval has been or is reasonably expected to be extended for commencement of construction.

(b) Public hearing required; information to be made available to public.- Not more than 60 days after the statement is completed, the Department shall hold at

least one public hearing in the county in which the facility or any part of it is situated to solicit the views of the public about the permit application. Prior to the public hearing the Department shall make the statement available to the public. In addition, any comments on the statement prepared by the Department or any other State department, any proposed permits to be issued by any State agency to the applicant, any conditions proposed by the Department prior to granting a permit, and any other pertinent information shall be made available to the public prior to the hearing.

(c) Notice of hearing.- The Department shall give notice of the public hearing by furnishing the same to the appropriate State and local government units as well as publishing notice in a newspaper of statewide circulation and in a newspaper published in or having general circulation in each affected county.

§ 14-508. Permit for construction of facility - Grant, conditional grant or denial of permit; periodic inspections to determine compliance with terms of permit.

(a) Grant, conditional grant or denial of permit - In general.- Within 90 days following the completion of the public hearing under § 14-507 of this subtitle, and after receiving the advisory comments and recommendations of the Secretaries of Natural Resources, Business and Economic Development, and Transportation and the Director of Planning, the Secretary shall decide whether to grant, grant conditionally, or deny the permit. The Secretary's decision shall be in writing and based upon the economic and environmental statement,

the public hearing record, and a determination that the applicant has shown satisfactorily that the facility:

(1) Conforms with and meets all applicable air, water, noise, and solid waste laws of the State as determined and certified in writing by the appropriate State unit with jurisdiction over these laws;

(2) Conforms with adopted or approved county or local land use planning and the official county or local comprehensive zoning map;

(3) Conforms with the State development plan, if such plan has been lawfully approved and adopted;

(4) Would have no material adverse effect upon the natural environment of the area, its scenic or natural beauty, rare or irreplaceable natural resources, or unique historic sites;

(5) Would not be so located or constructed as to have a material adverse effect upon the public health, safety, or welfare;

(6) Would not be a potential or immediate undue burden on the water supply of the site or region;

(7) Would not materially contribute to an extant level of undue environmental degradation or resource exhaustion;

(8) Conforms with any coastal zone management program developed by the State of Maryland pursuant to the federal Coastal Zone Management Act of 1972;

(9) Would have no material adverse effect upon critical areas identified and designated pursuant to § 5-611 of the State Finance and Procurement Article and Article 66B, § 3.05 of the Code;

(10) Would not impose, directly or indirectly, a substantial burden on existing State, regional, or county public facilities beyond their respective capacities, or that new public facilities, if necessary, either:

(i) Would not be completed in time to serve the facility; or

(ii) Would be inadequate to serve the facility without causing overloading of the public facilities; and

(11) Evidences fewer undesirable environmental, economic, fiscal, and cultural consequences in its specific or general proposed location than other specific or general locations.

(b) Grant, conditional grant or denial of permit - Regulations; procedures.-

(1) The Secretary shall adopt regulations as provided in this subsection.

(2) Procedural regulations adopted under this subsection shall:

(i) Provide for notice to interested persons of any decision to issue or deny a permit;

(ii) Permit a person to request a hearing under Title 10, Subtitle 2 of the State Government Article (Administrative Procedure Act - Contested Cases), if the person makes factual allegations with sufficient particularity to demonstrate that:

1. The person is aggrieved by the decision; and

2. The decision is:

A. Legally inconsistent with any provision of law applicable to the decision being challenged; or

B. Based upon an incorrect determination of a relevant and material fact;

(iii) Provide the Secretary with discretionary authority to stay the effectiveness of the decision pending the outcome of the hearing; and

(iv) Provide that, if a request for a hearing is granted, the Secretary's decision on the application shall be based on the record made in the hearing, including the proposed findings of fact and conclusions of law recommended to the Secretary by the presiding officer.

(c) Periodic inspection to determine compliance with terms of permit.- The Department shall periodically inspect, and the applicant shall allow such inspection, to determine if the terms of the granted permit are being met.

§ 14-509. Permit for construction of facility - Judicial review of action on application.

(a) Request for judicial review - Time and place for filing.- A request for judicial review of the Secretary's action on any application shall be made within 30 days after the decision has been rendered. Proceedings shall be filed in the circuit court of any county having jurisdiction in which the facility or any part of it is to be situated.

(b) Request for judicial review - Who may file.- A request for judicial review may be made only by an aggrieved party, by a properly designated official of the county government where the proposed facility is to be located, or by the Department of Planning pursuant to § 5-611 of the State Finance and Procurement Article.

(c) Scheduling of appropriate hearings and trials.- In order to expedite judicial review, any court of the State, either at the trial or appellate level, which acquires jurisdiction over any legal challenge to the Secretary's action on any application shall give highest priority to such proceeding in the scheduling of appropriate hearings and trials and in the respective court's deliberations.

§ 14-510. Violations; injunctions; penalty.

(a) Violations.- Any person who violates any provision of this subtitle may be enjoined by a court of competent jurisdiction upon application of the Department acting through the Attorney General.

(b) Injunctions; penalty.- Any person who violates any provision of this subtitle or any regulation, permit, or order issued thereunder, is liable to a penalty not exceeding $10,000, as well as being subject to being

enjoined as provided in subsection (a) of this section. The monetary penalty thus provided may be recovered in a civil action by the Department through the Attorney General.

§ 14-511. Construction of subtitle.

(a) Liberal construction.- This subtitle shall be liberally construed to effectuate its intents and purposes.

(b) Supplemental to other laws.- Nothing in this subtitle may be construed to be in derogation of any powers or State laws in existence on July 1, 1975, but shall be regarded as supplemental and in addition to powers conferred by other laws.

Baltimore County Code ARTICLE 33. ENVIRONMENTAL PROTECTION AND RESOURCE MANAGEMENT

SUBTITLE 1. GENERAL PROVISIONS
§ 33-2-101. DEFINITIONS.

(a) In general.

(1) In this title the following words have the meanings indicated.

(2) In this title a word that is not defined in this section shall be defined as under the following sources:

(i) COMAR, title 27.01.01;

(ii) § 32-4-101 of the Code; or

(iii) If not defined in the above sources, the most recent edition of Webster's Third New International Dictionary of the English Language, unabridged.

(b) Agriculture.

(1) "Agriculture" means all methods of producing, processing, storing, and managing livestock, crops, vegetation, and soil.

(2) "Agriculture" includes the related activities of:

(i) Tilling, fertilizing, controliing pests, harvesting, and marketing; and

(ii) Feeding, housing, maintaining, and handling of by-products of, animals including cattle, dairy cows, sheep, goats, hogs, horses, and poultry.

(c) Aquaculture.

(1) "Aquaculture" means the farming or culturing, or both, of finfish, shellfish, other aquatic animals, or aquatic plants, in lakes, streams, inlets, estuaries, and other natural or artificial water bodies.

(2) "Aquaculture" includes:

(i) The hatching, cultivating, planting, feeding, raising, and harvesting of aquatic plants and animals;

(ii) The maintenance and construction of necessary equipment, buildings, and growing areas; and

(iii) Cultivation methods, including:

1. Seed or larvae development;

2. The use of grow-out facilities, fish pens, shellfish rafts, racks and longlines, or seaweed floats; and

3. The culture of clams and oysters on tidelands and subtidal areas.

(3) "Aquaculture" does not include related activities such as wholesale and retail sales, processing, and the use of product storage facilities.

(d) Best management practices. "Best management practices" means a conservation practice or system of practices and management measures that

control soil loss and reduce water quality degradation caused by nutrients, animal waste, toxins, and sediment.

(e) Boathouse. "Boathouse" means a structure with a roof, cover, or similar device placed over open water to protect a boat or other vessel.

(f) Buffer. "Buffer" means a naturally vegetated area or a vegetated area established or managed to protect aquatic, wetland, shoreline, and terrestrial environments from man-made disturbances.

(g) Chesapeake Bay Critical Area Criteria. "Chesapeake Bay Critical Area Criteria" means regulations adopted by the Chesapeake Bay Critical Area Commission.

(h) Chesapeake Bay Critical Area Farm. "Chesapeake Bay Critical Area farm" means all land in the Chesapeake Bay Critical Area that is agriculturally assessed by the State Department of Assessments and Taxation.

(i) Chesapeake Bay Critical Area Law. "Chesapeake Bay Critical Area Law" means Title 8, Subtitle 18 of the Natural Resources Article of the Annotated Code of Maryland.

(j) Clearcutting. "Clearcutting" means removing an entire stand of trees in one cutting with subsequent afforestation obtained:

(1) By natural seeding from adjacent tree stands;

(2) From trees that were cut;

(3) From advanced regeneration or stump sprouts; or

(4) From planting of seeds or seedlings by a person.

(k) Cluster development. "Cluster development", notwithstanding the defined term "cluster subdivision"

under § 32-4-101 of the Code, means a residential development in which dwelling units are concentrated in a selected area of the development tract to provide natural habitat, forest preservation, or other permanent open space uses on the remainder of the land.

(l) Commercial harvesting.

(1) "Commercial harvesting" means an operation for economic gain that alters the composition or profile of a forest.

(2) "Commercial harvesting" includes a cutting operation done by a person for economic gain.

(m) Community pier.

(1) "Community pier" means a noncommercial boat docking or mooring facility that is owned by and operated for the benefit of residents of a platted riparian subdivision or a condominium, an apartment complex, or other multiple-family dwelling unit.

(2) "Community pier" does not include a private pier maintained by a riparian landowner or a non-profit organization.

(n) Conservation easement. "Conservation easement" means a nonpossessory interest in land that, to conserve natural resources for future use, restricts the manner in which a person may develop the land.

(o) Dredging. "Dredging" means the removal or displacement of soil, sand, gravel, shells, or other material from state tidal wetlands or private tidal wetlands.

(p) Filling.

(1) "Filling" means displacing tidal water by depositing soil, sand, gravel, shells, other materials, pilings, piers, boathouses, deadweights, or riprap in a wetland.

(2) "Filling" includes:

(i) The artificial altering of a tidal water level by a physical structure or drainage ditch or another method;

(ii) Implementing a storm drainage project in which matter flows directly into tidal waters of this state; or

(iii) Changing the soil surface or the elevation of the preexisting surface or ground water level of an area by placing soil, sand, gravel, shells, rock, or other material in the area.

(q) Finding. "Finding" means a written statement and supporting record, made by the Director of Environmental Protection and Resource Management or the Director's designee in conjunction with project approval, indicating that a project is consistent with the goals of the Chesapeake Bay Critical Area Criteria under COMAR 27.01.10.01O.

(r) Fishery activity. "Fishery activity" means:

(1) The construction and operation of a commercial water-dependent fishery facility, including:

(i) A structure for the packing, processing, canning, or freezing of finfish, crustaceans, mollusks, amphibians, or reptiles; or

(ii) A storage facility, crab shedding facility, off-loading dock, related fuel facility, or shore-based facility necessary for an aquaculture operation;

(2) Wholesale and retail sales;

(3) The fabrication of fishing and shellfishing equipment; or

(4) Shellfish culture operations.

(s) Forest. "Forest" includes a land area at least one acre in size that supports:

(1) At least 100 trees per acre, with at least 50% of those trees having at least a two-inch diameter at the height of 4.5 feet above the ground; or

(2) Mature trees that provide a contiguous canopy over unimproved land.

(t) Highly erodible soil. "Highly erodible soil" means those soils susceptible to runoff and erosion as determined by a steep slope and erodible soils evaluation.

(u) Intensely developed area. "Intensely developed area" means an overlay area delineated on the official Chesapeake Bay Critical Area map of the county in accordance with COMAR 27.01.02.03.

(v) Limited development area. "Limited development area" means an means an overlay area delineated on the official Chesapeake Bay Critical Area map of the county in accordance with COMAR 27.01.02.04.

(w) Local protection program. "Local protection program" means the program for the Chesapeake Bay Critical Area in the county prepared and approved under § 8-1809 of the Natural Resources Article of the Annotated Code of Maryland.

(x) Marina.

(1) "Marina" means a facility on tidal waters for the mooring, berthing, storing, or securing of watercraft.

(2) "Marina" does not include a community pier or another noncommercial boat docking and storage facility.

(y) Mean high-water line. "Mean high-water line" means the average level of high tide at a specified location.

(z) Nonwater-dependent facility or activity. "Nonwater-dependent structure, facility, or activity" means a structure, facility, or activity that, because of its intrinsic nature, does not need to be located:

(1) In or over tidal wetlands; or

(2) At or near the shoreline within the buffer.

(aa) Offset. "Offset" means a structure, action, or fee that compensates for an undesirable impact of a land use.

(bb) Overburden. "Overburden" means strata or material in its natural state before removal by surface mining that:

(1) Overlies a mineral deposit; or

(2) Lies in between mineral deposits.

(cc) Pier. "Pier" means a fixed or floating wharf, dock, walkway, or other similar water-dependent structure constructed or placed on or over tidal wetlands to gain access to the navigable waters of this state.

(dd) Private harvesting. "Private harvesting" means cutting and removing trees for personal, noncommercial use.

(ee) Private tidal wetland.

(1) "Private tidal wetland" means land that:

(i) Is not state wetlands;

(ii) Borders on or lies beneath tidal waters;

(iii) Is subject to regular or periodic tidal action; and

(iv) Supports aquatic growth.

(2) "Private tidal wetland" includes:

(i) Tidal wetlands transferred by the state by a valid grant, lease, license, or grant confirmed by Article 5 of the Maryland Declaration of Rights, to the extent of the interest transferred; or

(ii) Tidal waters that are:

1. Created by the excavation of upland; and

2. Not conveyed to the state.

(ff) Project approval.

(1) "Project approval" means the approval of development in the Chesapeake Bay Critical Area by:

(i) The Director of Environmental Protection and Resource Management or the Director's designee;

(ii) A hearing officer;

(iii) The zoning commissioner; or

(iv) On appeal, the Board of Appeals.

(2) "Project approval" includes:

(i) The approval of a subdivision plan, plat, and site plan; and

(ii) The granting of a variance or special exception.

(3) "Project approval" does not include approval of development by a state or local government agency.

(gg) Public water-oriented recreation. "Public water-oriented recreation" means a shore-dependent recreation facility or activity that is provided by a public agency and available to the general public.

(hh) Reclamation. "Reclamation" means the reasonable rehabilitation of disturbed land for:

(1) A useful purpose; and

(2) The protection of the natural resources of an adjacent area, including a water body.

(ii) Redevelopment. "Redevelopment" means the process of developing land that previously has been developed.

(jj) Reforestation. "Reforestation" means the establishment of a forest through artificial reproduction or natural regeneration.

(kk) Regular or periodic tidal action. "Regular or periodic tidal action" means the rise and fall of the sea that is:

(1) Caused by the gravitational attraction of the sun and the moon; and

(2) Not influenced by wind or other circumstances.

(ll) Resource Conservation Area. "Resource Conservation Area" means an area that:

(1) Is characterized by:

(i) A nature-dominated environment, including wetlands, forests, or abandoned fields; or

(ii) Resource-utilization activity, including agriculture, forestry, fishery activity, or aquaculture; and

(2) Meets the requirements specified under COMAR 27.01.02.05.

(mm) Selection. "Selection" means the removal of individual scattered trees from uneven-aged stands by frequent and periodic cutting operations.

(nn) Shore erosion protection works or measures. "Shore erosion protection works or measures" means structures or measures constructed or installed to prevent or minimize shore erosion.

(oo) Significantly eroding area. "Significantly eroding area" means an area that erodes at least 2 feet per year.

(pp) Spoil pile. "Spoil pile" means overburden and rejected material that is piled or deposited during surface mining.

(qq) State tidal wetland.

(1) "State tidal wetland" means land that is:

(i) Under the navigable waters of this state below the mean high-water line; and

(ii) Subject to regular or periodic tidal action.

(2) "State tidal wetland" does not include wetlands under paragraph (1) of this subsection that have been transferred by the state by valid grant, lease, license, or grant confirmed by Article 5 of the

Maryland Declaration of Rights to the extent of the interest transferred.

(rr) Thinning. "Thinning" means a forest practice, which may include harvesting, used to accelerate the growth of quality trees.

(ss) Tidal wetland boundary map. "Tidal wetland boundary map" means a map or aerial photograph on a scale of one inch equals 200 feet adopted by the State Department of Natural Resources that delineates the landward boundary of tidal wetlands.

(tt) Transportation facility.

(1) "Transportation facility" means anything that is built, installed, or established to provide a means of transport from one place to another.

(2) "Transportation facility" includes a trucking facility, an airport, or a railway station.

(3) "Transportation facility" does not include a marina, motorway, railway, or water-dependent facility.

(uu) Upland. "Upland" means any area that is not a tidal wetland or nontidal wetland.

(vv) Utility transmission facility.

(1) "Utility transmission facility" means a fixed structure that conveys or distributes resources or waste.

(2) "Utility transmission facility" includes electric lines, water conduits, and sewer lines.

(ww) Wash plant. "Wash plant" means a facility in which sand and gravel is washed during processing.

(xx) Water-dependent structure, facility, or activity. "Water-dependent structure, facility, or activity" means a structure, facility, or activity that, because of its intrinsic nature, must be located:

(1) In or over a tidal wetland; or

(2) At or near the shoreline in the buffer.

(1988 Code, § 26-438) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-102. FINDINGS.

The County Council finds and declares that:

(1) The Maryland General Assembly has:

(i) Recognized that the Chesapeake Bay and its tributaries are "natural resources of great significance to the state and the nation"; and

(ii) Enacted the Chesapeake Bay Critical Area law to protect the endangered Chesapeake Bay by establishing a resource protection program in the Chesapeake Bay Critical Area;

(2) The goals of the program are to monitor and control development in the Chesapeake Bay Critical Area to:

(i) Minimize adverse effects on water quality that result from pollutants that are discharged from a structure or conveyance and run off from the surrounding land; and

(ii) Conserve fish, wildlife, and plant habitats; and

(3) To implement the program, the state has adopted the Chesapeake Bay Critical Area criteria that establish detailed regulation to be adopted and enforced in the portion of the county determined to be the Chesapeake Bay Critical Area.

(1988 Code, § 26-436) (Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-103. PURPOSE.

This title is adopted to assist in complying with the purposes and requirements of the Chesapeake Bay Critical Area law and the Chesapeake Bay Critical Area criteria, by:

(1) Fostering more environmentally sensitive development activity along and near the shoreline areas

of the Chesapeake Bay and its tributaries to minimize adverse impacts to water quality and natural habitats;

(2) Generally minimizing adverse impacts on water quality;

(3) Conserving fish, wildlife, and plant habitats;

(4) Accommodating growth in an environmentally sensitive manner to minimize adverse environmental impacts; and

(5) Establishing land use policies for the Chesapeake Bay Critical Area that accommodate growth and address the fact that, even if pollution is controlled, the number and activity of persons in the Chesapeake Bay Critical Area may create adverse environmental effects.

(1988 Code, §§ 14-256, 26-437) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-104. APPLICABILITY.

(a) Land use activity. Except as provided in subsection (b) of this section, this title applies to land use and development activity in the Chesapeake Bay Critical Area.

(b) Exception. This title does not apply to the subdivision of land in the Chesapeake Bay Critical Area that is exempt from development regulations under § 32-4-105 of the Code.

(c) Conflict of laws. In a conflict between this title and other county regulations, including the development regulations under Article 32, Title 4 of the Code, the requirements of this title shall prevail.

(1988 Code, §§ 14-256, 26-440, 26-441) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-105. OFFICIAL CHESAPEAKE BAY CRITICAL AREA MAP.

(a) In general.

(1) The Director of Environmental Protection and Resource Management shall maintain the official map of the county Chesapeake Bay Critical Area.

(2) The official map of the county Chesapeake Bay Critical Area:

(i) Is at a scale of one inch equals 600 feet;

(ii) Shows the boundary of the county Chesapeake Bay Critical Area;

(iii) Shows the boundary of the intensely developed areas and the limited development areas; and

(iv) Shows, for information purposes only, the resource conservation area, as enacted by the official county zoning map under § 100.2 of the Baltimore County Zoning Regulations and shown by the RC-20 and RC-50 zones on the official county zoning map.

(b) Incorporation by reference. The official map of the county Chesapeake Bay Critical Area is incorporated by reference.

(c) Conflict of laws.

(1) Except as provided in paragraph (2) of this subsection, in a conflict between the Chesapeake Bay Critical Area boundary shown on the official map of the county Chesapeake Bay Critical Area and the tidal wetland boundary map, the boundary on the tidal wetland boundary map shall prevail.

(2) The Chesapeake Bay Critical Area boundary on the official map of the County Chesapeake Bay Critical Area shall prevail if the boundary is expanded beyond the initial planning area determined under § 8-1807(a)(2) of the Natural Resources Article of the Annotated Code of Maryland.

(1988 Code, § 26-439) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 2. GENERAL REQUIREMENTS

§ 33-2-201. PERMITS.

Before the Department of Permits Development Management issues a building permit, grading permit, or use and occupancy permit in the Chesapeake Bay Critical Area, the Director of Environmental Protection and Resource Management or the Director's designee shall determine, and certify to the Director of Permits Development Management, that the development complies with this title.

(1988 Code, § 26-458) (Bill No. 18, 1990, § 2; Bill No 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-202. PLAN REQUIREMENTS.

(a) In general. In addition to the plan requirements for concept plans and development plans under Article 32, Title 4, Subtitle 2 of the Code, the Department of Environmental Protection and Resource Management may require additional information from an applicant to evaluate whether a project complies with the Chesapeake Bay Critical Area law, the Chesapeake Bay Critical Area criteria, and this title.

(b) Project approval. The Director of Environmental Protection and Resource Management may grant project approval after making written findings that the project is consistent with the purposes stated under § 33-2-103 of this title and the Chesapeake Bay Critical Area criteria.

(1988 Code, § 26-442) (Bill No 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-203. DEVELOPMENT - PLATS AND PROTECTIVE COVENANTS.

(a) Required protective covenants.

(1) A person who submits a plat to the county under Article 32, Title 4 of the Code shall also submit an irrevocable offer of dedication to the county of all

habitat protection areas, buffers, wetlands, forests and developed woodlands, afforestation and reforestation areas, wildlife corridors, and floodplains.

(2) (i) Subject to subparagraph (ii) of this paragraph, the applicant shall determine the scope of the offer.

(ii) The scope of the offer:

1. May be in fee or an easement to protect the areas; and

2. Shall be at least a grant of a right-of-access to the county to:

A. Inspect and maintain the protected area; and

B. Provide for the abatement and correction of water pollution, erosion, and sedimentation of stream channels, shorelines, tidal wetlands and nontidal wetlands, or floodplains.

(3) The grant shall be in a form approved by the Office of Law.

(b) Retention or conveyance of protected area.

(1) An applicant who retains any of the protected areas listed in subsection (a) of this section or conveys these areas to a homeowner's association or similar entity shall submit a declaration of protective covenants to the Office of Law for approval.

(2) The declaration shall:

(i) Be in a form approved by the Office of Law; and

(ii) Include the management requirements for these areas listed in § 33-2-204 of this subtitle.

(3) The protective covenants shall:

(i) Be recorded in the county land records;

(ii) Run with the land; and

(iii) Continue in perpetuity.

(c) Plat requirements. In addition to the plat requirements under Article 32, Title 4, Subtitle 2 of the Code, a plat prepared for recording of the Chesapeake Bay Critical Area clearly shall:

(1) Show by metes and bounds the extent of a protected area under subsection (a) of this section on the property;

(2) Label the protected areas, collectively, as a:

(i) Chesapeake Bay Critical Area easement if the areas are to be retained or conveyed to a homeowner's association or similar entity; or

(ii) Chesapeake Bay Critical Area reservation if the areas are to be dedicated to the county in fee;

(3) Include a note, referencing any protected area, that states:

"There shall be no clearing, grading, construction or disturbance of vegetation in the critical area easement (or reservation) except as permitted by the county Department of Environmental Protection and Resource Management"; and

(4) Include a note, referencing a protective covenant governing a protected area, that states:

"Any critical area easement (or reservation) shown hereon is subject to protective covenants which may be found in the land records of the county and which restrict disturbance and use of these areas".

(d) Protective covenants - Public right-of-access not implied. A dedication to the county of a Chesapeake Bay Critical Area easement or reservation may not be construed to convey automatically to the general public the right-of-access to the area.

(1988 Code, § 26-443) (Bill No. 18, 1990, § 2; Bill No 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004; Bill No. 75-03, § 45, 7-1-2004)

§ 33-2-204. MANAGEMENT REQUIREMENTS.

(a) Management required. A habitat protection area, buffer, wetland, forest, developed woodland, afforestation area, reforestation area, wildlife corridor, floodplain, stream, stream channel, or shoreline in a Chesapeake Bay Critical Area easement or reservation shall be managed, including specific limitations on the alteration of the natural condition of these resources, to enhance and maximize the unique value of these resources.

(b) Prohibited. Within the boundary of a Chesapeake Bay Critical Area resources easement or reservation that contains the Chesapeake Bay Critical Area resources listed in subsection (a) of this section, a person may not:

(1) Disturb existing vegetation, including disturbance by tree removal, shrub removal, clearing, mowing, burning, spraying, or grazing;

(2) Disturb soil by grading, stripping topsoil, plowing, cultivating, or other practices;

(3) Conduct filling, dumping, diking, ditching, or draining;

(4) Construct or install structural shore erosion protection measures, except:

(i) As provided under COMAR 27.01.04 and § 33-2-607 of this title; and

(ii) Only as authorized by the Department of Environmental Protection and Resource Management;

(5) Place new impervious surfaces;

(6) Place structures of any size;

(7) Store, use, or apply pesticides, except for the spot spraying of noxious weeds consistent with the recommendations of the University of Maryland Cooperative Extension Service;

(8) House, graze, or otherwise maintain animals;

(9) Store or operate motorized vehicles, except for maintenance and emergency use approved by the Department of Environmental Protection and Resource Management; or

(10) Store materials.

(c) Building setbacks.

(1) The primary structure on a parcel or lot shall be set back from the outer edge of a Chesapeake Bay Critical Area easement or reservation that contains Chesapeake Bay Critical Area resources listed in subsection (a) of this section at a minimum distance of:

(i) 35 feet for a residential dwelling; and

(ii) 25 feet for a commercial or industrial structure.

(2) The setback area may include private or public land or both.

(3) Accessory structures, including roads or driveways, storm drainage, stormwater management devices and practices, utilities, recreational facilities, or patios, are allowed in the setback area.

(d) Regulations; public service companies. The Director of Environmental Protection and Resource Management, in accordance with Article 3, Title 7 of the code, may adopt regulations that are consistent with this title to address issues relating to the maintenance and modification of existing facilities owned and operated by a public service company.

(1988 Code, § 26-444) (Bill No. 18, 1990, § 2; Bill No 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-205. VARIANCES.

(a) In general. Notwithstanding § 32-4-231(a)(4) of the Code, the Director of Environmental Protection

and Resource Management may grant a variance from the requirements of this title, in accordance with the Chesapeake Bay Critical Area criteria concerning variances under COMAR 27.01.11 and notice requirements under COMAR 27.03.01, if a proposed development is:

(1) Exempted from review and approval under § 32-4-106 of the Code; or

(2) Granted a hearing waiver under § 32-4-107(b) of the Code.

(b) Notice. Notice of an applicant's variance proposal shall be published once in a newspaper of general circulation in the county 15 days before variance approval.

(c) Conditions of approval. The Director of Environmental Protection and Resource Management may require conditions for variance approval, including site design conditions or mitigation, to minimize adverse impacts on water quality or fish, wildlife, or plant habitat.

(d) Appeals. A person aggrieved or feeling aggrieved by a decision of the Director of Environmental Protection and Resource Management made under subsection (a) of this section may appeal the decision de novo to the Board of Appeals.

(e) Regulations. The Director of Environmental Protection and Resource Management, in accordance with Article 3, Title 7 of the Code, may adopt regulations for the preparation and review of proposed development projects and other activities in the Chesapeake Bay Critical Area that are consistent with the Chesapeake Bay Critical Area law and Chesapeake Bay Critical Area criteria.

(1988 Code, § 26-445) (Bill No. 222, 1992, § 1; Bill No. 120-93, 1993, §§ 1, 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004; Bill No. 75-03, § 45, 7-1-2004)

§ 33-2-206. OTHER LAND USES.

All other land uses allowed in the Chesapeake Bay Critical Area, including grandfathered uses allowed under § 103.5 of the Baltimore County Zoning Regulations, shall, to the greatest extent practicable, comply with the standards under this title, except that:

(1) The vegetated buffers specified in § 33-2-401 of this title shall remain undisturbed;

(2) Vegetative cover shall be established and maintained on permeable areas;

(3) Destruction of forest and developed woodland vegetation shall be minimized; and

(4) Subtitles 3 and 5 and §§ 33-2-401 through 33-2-404 and § 33-2-604 of this title shall apply in their entirety.

(1988 Code, § 14-257) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-207. CLUSTER DEVELOPMENT.

To minimize impervious surfaces and destruction of forest and woodland vegetation, cluster development, unless it is demonstrably infeasible or inappropriate for the site, is the preferred method for designing residential development in the Chesapeake Bay Critical Area.

(1988 Code, § 26-446) (Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-208. DESIGN REQUIREMENTS.

(a) Purpose. The design standards and requirements established under this title are intended to assure that the preparation and review of proposed development in the Chesapeake Bay Critical Area is in compliance with the requirements under the Chesapeake Bay Critical Area criteria.

(b) Applicability. Subject to § 33-2-104 of this title, development shall:

(1) Meet the requirements of this article;

(2) Meet the standards and requirements under Article 32, Title 4 of the Code; and

(3) Conform to the policy and intent of the Code.

(1988 Code, § 26-445) (Bill No. 222, 1992, § 1; Bill No. 120-93, 1993, §§ 1, 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-209. SURFACE MINING.

(a) Siting of surface mining.

(1) Surface mining operations in the Chesapeake Bay Critical Area shall be sited to minimize pollution from sedimentation and siltation, chemical and petrochemical use and spillage, noise and the storage or disposal of wastes, dusts and spoils.

(2) The operation shall be conducted to allow the rapid reclamation of the site, including the wash ponds, when the operation has terminated.

(b) Requirements for operations. Surface mining operations, including access roads, accessory or related improvements, equipment and storage areas:

(1) Shall comply with the wetland, buffer, and habitat protection requirements in Subtitles 3, 4, and 5 of this title;

(2) May not be authorized if the surface mining activity would prevent the use of the site for agricultural or forestry purposes for more than 25 years;

(3) Shall, upon completion of the surface mining operation, return the property to a condition capable of sustaining agricultural or forest use or to another use allowed by the Chesapeake by Critical Area land use classification in which the operation occurs; and

(4) Shall incorporate a multipurpose berm or buffer to protect neighboring residential properties from pollutants.

(c) Self-containment. Wash plants including ponds, spoil piles and associated equipment must be hydrologically self-contained, unless it can be conclusively proven to the Department of Environmental Protection and Resource Management that there will be no risk of water quality degradation.

(1988 Code, § 14-265) (Bill No. 10-96, § 1, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004; Bill No. 75-03, § 45, 7-1-2004)

SUBTITLE 3. WETLANDS PROTECTION

§ 33-2-301. ESTABLISHMENT.

An area has wetland vegetation if hydrophytic vegetation comprises a community where indicators of hydric soils and wetland hydrology also occur.

(1988 Code, § 26-438) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-302. PROHIBITED ACTS.

Except as provided in § 33-2-303 and §§ 33-2-604 through 33-2-607 of this title, dredging, filling, clearing, or construction are prohibited in nontidal wetlands or tidal wetlands.

(1988 Code, § 26-447) (Bill No. 18, 1990, § 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-303. NONTIDAL WETLAND PROTECTION.

(a) Buffer. A minimum 25 foot buffer shall be established and remain undisturbed around all nontidal wetlands to prevent development or other activity from adversely affecting the wetlands or the wildlife contained in the wetlands.

(b) Water discharge.

(1) Alterations to the surface or subsurface flow of water into and from nontidal wetlands shall be

minimized to protect the hydrologic processes and water quality of the nontidal wetlands.

(2) Minimizing alterations to water flow under paragraph (1) of this subsection may include:

(i) Maximizing the infiltration of water throughout the site, rather than concentrating flows into direct discharge points; or

(ii) Decentralizing the discharge points if the use of these discharge points cannot be avoided for stormwater management.

(c) Development activities - Prohibited. Development activity, including redevelopment activity, the construction of a structure, parking area, or other impervious surface, mining and the use of related facilities, and the installation of a septic system, is prohibited in nontidal wetlands or nontidal wetlands buffers.

(d) Improvements - Limitations.

(1) Except as provided in paragraph (2) of this subsection, improvements, including roads, trails, bridges, storm drainage, stormwater management devices and practices, and utilities, are prohibited in nontidal wetlands or nontidal wetlands buffers.

(2) Improvements in nontidal wetlands or nontidal wetlands buffers may be allowed if the Director of Environmental Protection and Resource Management approves an alternatives analysis submitted by an applicant that clearly demonstrates that:

(i) No physically feasible alternative exists; and

(ii) The improvements are located, designed, constructed, and maintained to:

1. Provide maximum erosion protection;

2. Minimize adverse effects on wildlife, aquatic life, and the respective habitats; and

3. Maintain hydrologic processes and water quality.

(3) The impacted area shall be restored following any disturbance.

(e) Mitigation. Activities or uses that are allowed under the approval of an alternatives analysis, a variance, or a variation of standards, shall only occur in conjunction with mitigation measures that:

(1) Provide water quality benefits and plant and wildlife habitat equivalent to the level before the nontidal wetland was affected or destroyed; and

(2) Shall be accomplished, to the maximum extent possible, on or near the affected nontidal wetlands.

(1988 Code, § 26-448) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 4. BUFFERS

§ 33-2-401. ESTABLISHED.

(a) Minimum boundary.

(1) In this subsection, "stream order" means a classification system of streams based on stream hierarchy. The smaller the stream, the lower its numerical classification. A first order stream does not have tributaries and normally originates from springs, seeps, or both. At the confluence of two first order streams, a second order stream begins. A third order stream begins at the confluence of two second order streams and so on.

(2) Except as provided in §§ 33-2-405 and 33-2-406 of this subtitle and Subtitle 7 of this title, and subject to subsection (b) of this section, a minimum buffer shall be established and remain undisturbed:

(i) 100 feet landward from the mean high-water line of tidal waters or tidal wetlands;

(ii) 100 feet from the centerline of a first order stream or second order stream;

(iii) 100 feet from the stream bank of the active channel (bank-full flow) of a stream higher than second order;

(iv) 25 feet from the outer nontidal wetland boundary; and

(v) 25 feet from the riverine floodplain reservation or easement boundary.

(b) Expansion.

(1) (i) The buffer shall be expanded beyond the minimum buffer to include contiguous, sensitive areas, including steep slopes, hydric soils, or highly erodible soils, since development or disturbance of these areas may adversely affect streams, wetlands, or other aquatic environments.

(ii) The buffer expansion under this paragraph shall be executed in conjunction with a steep slope and erodible soils evaluation, using the evaluation procedures and criteria under § 33-3-111(c) of this article.

(2) (i) Subject to subparagraph (ii) of this paragraph, the buffer shall be expanded to 300 feet landward from the mean high-water line of tidal waters, tidal wetlands, and streams for new residential developments exceeding five dwelling units in a limited development area or a resource conservation area.

(ii) The buffer may be reduced to the greater of the minimum buffer under subsection (a) of this section or to the expanded buffer under paragraph (1) of this subsection if:

1. The 300-foot area does not contain contiguous forest habitat that drains into tidal wetlands, tidal waters, or a stream;

2. The 300-foot area does not provide breeding habitat for species of forest interior dwelling bird; and

3. The Director of Environmental Protection and Resource Management determines that greater water quality or habitat benefits can be achieved through other site specific measures.

(1988 Code, §§ 14-261, 26-438, 26-449) (Bill No. 18, 1990, § 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004; Bill No. 108-05, § 2, 10-30-2005)

Editor's note:

The amendments enacted under § 2 of Bill 108-05 are effective retroactive to July 1, 2004.

§ 33-2-402. REQUIREMENTS.

(a) Natural vegetation to remain undisturbed. Except as provided in subsection (b) of this section, the natural vegetation occurring in a buffer shall remain undisturbed.

(b) Establishing new vegetation authorized. Vegetation shall be planted in the buffer where necessary to protect, stabilize, or enhance the shoreline.

(c) Development activity prohibited; exception.

(1) Except as provided in paragraph (2) of this subsection, development activity, including redevelopment activity, the construction of a structure, parking area, or other impervious surface, mining and the use of related facilities, and the installation of a septic system, is prohibited in the buffer.

(2) Development activity that is necessarily associated with a water-dependent structure or activity or shore erosion protection works may be allowed in the

buffer if approved under § 417 of the Baltimore County Zoning Regulations and §§ 33-2-604 through 33-2-607 of this title.

(d) Improvements.

(1) Except as provided in paragraph (2) of this subsection, improvements, including roads, bridges, trails, storm drainage, stormwater management devices and practices, and utilities, are prohibited in the buffer.

(2) Improvements in the buffer may be allowed if the Director of Environmental Protection and Resource Management approves an alternatives analysis submitted by an applicant that clearly demonstrates that:

(i) No physically feasible alternative exists; and

(ii) The improvements are located, designed, constructed, and maintained to:

1. Provide maximum erosion protection;

2. Minimize adverse effects on wildlife, aquatic life, and the respective habitats; and

3. Maintain hydrologic processes and water quality.

(3) The impacted area shall be restored following any disturbance.

(e) Cessation of agriculture in buffer.

(1) If the agricultural use of land in the buffer area ceases and the land is proposed to be converted to other uses not governed by § 33-2-406 of this subtitle, then the other buffer requirements under this title shall be implemented.

(2) Implementation of buffer requirements under this subsection shall include management measures establishing forest vegetation to minimize

adverse impacts to water quality and improve wildlife habitat.

(f) Prohibited. Between March 1 and June 15 of each year, a person may not engage in:

(1) Construction, repair, or maintenance activity associated with bridges, other stream crossings, utilities, or roads, that involve disturbance in the buffer or instream in anadromous fish propagation waters; or

(2) Other instream construction activity determined by the Director of Environmental Protection and Resource Management to have the potential to adversely impact anadromous fish propagation.

(g) Mitigation. The Department of Environmental Protection and Resource Management may require onsite or offsite mitigation to offset impacts to a buffer, or to the plant and wildlife habitats or species contained in a buffer, that are the result of development activity.

(1988 Code, §§ 14-261, 26-449) (Bill No. 18, 1990, § 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-403. BUFFER MANAGEMENT AREAS.

(a) Authorized. The Director of Environmental Protection and Resource Management may designate as a buffer management area an area of the buffer where an existing pattern of residential, commercial, industrial, or institutional development prevents the buffer from fulfilling the water quality and habitat protection functions under COMAR 27.01.09.

(b) Regulations.

(1) In designating buffer management areas, the Director shall adopt regulations governing development and redevelopment in these areas.

(2) The regulations may require onsite or offsite mitigation or alternative measures to fulfill water quality and habitat protection functions.

(1988 Code, § 26-449) (Bill No. 18, 1990, § 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-404. BUFFER MITIGATION FUND.

(a) Establishment.

(1) There is a Buffer Mitigation Fund.

(2) The fund shall consist of:

(i) Subject to paragraph (3) of this subsection, monetary compensation paid under this subtitle by an applicant who demonstrates to the Department of Environmental Protection and Resource Management that requirements for buffer mitigation cannot be met;

(ii) Other monies that may be appropriated to the fund by the County Council; and

(iii) Interest accrued to the fund.

(3) (i) The Department of Environmental Protection and Resource Management may accept monetary compensation only if it determines that buffer mitigation requirements cannot be reasonably accomplished onsite or offsite.

(ii) Monetary compensation may not be a substitute for buffer mitigation that can be reasonably accomplished.

(4) Monetary compensation paid by an applicant under this section shall be paid before the approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

(b) Use of fund.

(1) The buffer mitigation fund may be used to implement:

(i) Water quality protection or restoration measures;

(ii) Habitat protection or restoration measures; or

(iii) Capital projects administered under the county's waterway improvement program.

(2) Monies credited and interest accrued to the Fund:

(i) Shall remain available until expended; and

(ii) May not revert to the general fund under any other provision of law.

(1988 Code, § 26-449) (Bill No. 18, 1990, § 2; Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-405. TREE OR VEGETATION CLEARING.

(a) Prohibited. Except as provided in subsection (b) of this section, the cutting or clearing of trees is prohibited in the buffer.

(b) Exceptions.

(1) (i) Subject to subparagraph (ii) of this paragraph, commercial harvesting of trees by selection may be allowed to within 50 feet of:

1. The landward edge of the mean high-water line of tidal waters and streams; or

2. The edge of tidal wetlands.

(ii) Harvesting under this paragraph may not occur:

1. In a habitat protection area; and

2. Unless the harvesting is conducted in conformance with a buffer management plan that is:

A. Prepared by a licensed forester; and

B. Approved by the Department of Environmental Protection and Resource Management and the forestry programs of the State Department of Natural Resources.

(iii) The buffer management plan is required for all commercial harvests in the buffer, regardless of the size of the area to be harvested, and:

1. Shall avoid disturbance to nontidal wetlands and associated buffers, stream banks, and shorelines;

2. Shall prohibit clearcutting in the buffer;

3. Shall require the disturbed or harvested area to be replanted or allowed to regenerate in a manner that assures the availability of cover and breeding sites for wildlife and reestablishes the wildlife corridor function of the buffer; and

4. May not create logging roads and skid trails in the buffer.

(2) The cutting of trees or removal of natural vegetation may be allowed in the buffer, if:

(i) Necessary to:

1. Provide access to private piers; or

2. Install or construct shore erosion protection works or a water-dependent facility; and

(ii) All necessary county, state, or federal permits have been obtained.

(3) Individual trees in the buffer may be privately harvested, if:

(i) The private harvesting does not impair water quality, existing habitat value, or other functions of the buffer as specified under COMAR 27.01.09.01B; and

(ii) Each tree harvested is replaced on an equal basis.

(4) An individual tree in the buffer may be removed if the tree is in danger of falling and:

(i) Causing damage to dwellings or other structures; or

(ii) Blocking streams or causing accelerated shore erosion.

(5) Horticultural practices may be used to maintain the health of individual trees.

(6) (i) Other cutting techniques may be used in the buffer if necessary to preserve the forest from:

1. Extensive pest or disease infestation; or
2. The threat of fire.

(ii) Cutting under this paragraph shall only occur with the advice and guidance of the Department of Environmental Protection and Resource Management and the State Departments of Agriculture and Natural Resources.

(1988 Code, §§ 14-262, 26-450) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 50-93, 1993, § 2, 7-10-1993; Bill No. 20-00, § 1, 3-24-2000; Bill No. 94-02, § 2, 7-1-2004; Bill No. 75-03, § 41, 7-1-2004)

§ 33-2-406. AGRICULTURE.

(a) Authorized. Subject to subsections (b) and (c) of this section and except as provided in subsection (d) of this section, agricultural uses and activities are allowed in the buffer.

(b) Zoning applicable. Agricultural uses and activities are subject to the restrictions in the Baltimore County Zoning Regulations.

(c) Filter strip; best management practices.

(1) Agricultural uses and activities are only allowed in the buffer if, as a minimum best management practice, a 25-foot vegetated filter strip measured landward from the further inland of the mean high-water line of tidal waters or streams, or the edge of tidal wetlands, is established.

(2) The filter strip shall be:

(i) Composed of trees with a dense ground cover or a thick sod of grass;

(ii) Managed to provide water quality benefits and habitat protection consistent with the Chesapeake Bay Critical Area criteria; and

(iii) For slopes greater than 6%, expanded by a distance of four feet horizontally for every 1% of slope.

(3) (i) The filter strip shall be maintained at least until the landowner is implementing, under an approved soil conservation and water quality plan, a program of best management practices for the specific purpose of improving water quality and protecting plant and wildlife habitat.

(ii) The portion of the soil conservation and water quality plan being implemented shall achieve the water quality and habitat protection objectives of the filter strip.

(iii) Best management practices shall include a requirement for the implementation of a grassland and manure management program.

(d) Prohibited.

(1) (i) Except as provided in subparagraph (ii) of this paragraph, clearing of existing natural vegetation in the buffer is prohibited.

(ii) Noxious weeds, including Johnson grass, thistle, and multiflora rose, that occur in the filter strip may be controlled by means authorized by the Director of Environmental Protection and Resource Management.

(2) Agricultural activities may not be established or expanded by:

(i) The diking, draining, or filling of nontidal wetlands; or

(ii) Intrusion into the buffer, unless:

1. No existing natural vegetation in the buffer is proposed to be cleared; and

2. The county Soil Conservation District, with the advice of the Department of Environmental Protection and Resource Management and the State Department of Natural Resources, certifies that the:

A. Mitigation measures accompanying the expansion are sufficient to accomplish the objectives of COMAR 27.01.09; and

B. Expansion is in accordance with an approved soil conservation and water quality plan; or

(iii) Clearing forest or woodland on highly erodible soils.

(3) Livestock feeding or grazing is prohibited within 50 feet of the mean high-water line of tidal waters, tidal wetlands, or streams.

(4) Agricultural activities, including livestock grazing, may not disturb the stability of stream banks or tidal shorelines.

(e) Soil conservation and water quality plan. A Chesapeake Bay Critical Area farm shall have and implement an approved soil conservation and water quality plan that incorporates best management practices, including control of nutrients, animal wastes, pesticides, and sediment runoff, to:

(1) Protect the productivity of the land base;

(2) Preserve or enhance water quality; and

(3) Conserve fish, wildlife, and plant habitat.

(1988 Code, § 14-263) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 5. HABITAT PROTECTION AREAS

§ 33-2-501. DISTURBANCE PROHIBITED; EXCEPTIONS.

(a) Prohibited. Except as provided in subsection (b) of this section, development activities or other land disturbances, including commercial tree harvesting and

agricultural activities, are prohibited in a habitat protection area.

(b) Exceptions.

(1) Subject to paragraphs (2), (3), and (4) of this subsection, development activities or other land disturbances are allowed in a habitat protection area if:

(i) The Director of Environmental Protection and Resource Management certifies that:

1. The location of and restrictions placed on the activities will provide for the continuity of wildlife habitat; and

2. The activities avoid adverse effects to the functioning of the area or to the species dependent on it; or

(ii) An alternatives analysis submitted by the applicant and approved by the Director of Environmental Protection and Resource Management clearly demonstrates that no other physically feasible alternative exists for the location of a road, trail, bridge, or utility.

(2) Development activity or other land disturbances may not alter the structure and species composition of natural heritage areas.

(3) The Director of Environmental Protection and Resource Management shall request and consider comment from the State Department of Natural Resources before providing certification under paragraph (1)(i) of this subsection.

(4) If the Director of Environmental Protection and Resource Management approves an alternatives analysis under paragraph (1)(ii) of this subsection, the road, trail, bridge, or utility shall be located, designed, constructed, and maintained to:

(i) Provide maximum erosion protection;

(ii) Minimize adverse effects on wildlife, aquatic life, and the respective habitats; and

(iii) Maintain hydrologic processes and water quality.

(c) Restoration; mitigation.

(1) The impacted area shall be restored following any disturbance allowed under subsection (b)(1)(ii) of this section.

(2) The Department of Environmental Protection and Resource Management may require onsite or offsite mitigation to offset impacts to a habitat protection area, or the plant and wildlife habitats or species contained in the area, resulting from development activity.

(1988 Code, §§ 14-259, 26-451) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 50-93, 1993, § 2, 7-10-1993; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-502. DESIGNATION OF NEW WETLANDS OR PROTECTED SPECIES.

(a) Protective measures. If the Secretary of Natural Resources designates by regulation new endangered species, threatened species, or species in need of conservation, the county shall adopt, in accordance with Article 3, Title 7 of the Code, protective measures for these species within 12 months after the Secretary's designation.

(b) Hearing. If additional nontidal wetlands, plant and wildlife habitat, or endangered species, threatened species, or species in need of conservation are identified for protection, the Director of Environmental Protection and Resource Management shall hold public hearings, as appropriate, to consider comments on proposed protection measures for the appropriate habitat protection areas.

(1988 Code, §§ 14-259, 26-451) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 50-93, 1993, § 2, 7-10-1993; Bill No. 94-02, § 2, 7-1-2004; Bill No. 75-03, § 45, 7-1-2004)

SUBTITLE 6. DEVELOPMENT

§ 33-2-601. OVERLAY AREAS.

(a) Purpose.

(1) Overlay areas are established to implement the requirements in the Chesapeake Bay Critical Area criteria relating to development in intensely developed areas, limited development areas, and resource conservation areas.

(2) The purpose of overlay area requirements under § 33-2-601 through § 33-2-603 of this subtitle is to:

(i) Foster more sensitive development in the Chesapeake Bay Critical Area to improve and minimize adverse effects to the natural plant, fish, and wildlife habitat and water quality in the Chesapeake Bay Critical Area;

(ii) Provide for orderly development and accommodate growth in the Chesapeake Bay Critical Area; and

(iii) Encourage the clustering of land uses in the Chesapeake Bay Critical Area.

(b) General requirements.

(1) An overlay area may not be superimposed on another overlay area.

(2) New development or redevelopment in the Chesapeake Bay Critical Area shall conform with the:

(i) Baltimore County Zoning Regulations; and

(ii) Development regulations under Article 32, Title 4 of the Code.

(1988 Code, § 26-440) (Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-602. INTENSELY DEVELOPED AREAS.

(a) Application. This section applies to new development and redevelopment in intensely developed areas in the Chesapeake Bay Critical Area.

(b) Development in intensely developed areas.

(1) (i) Subject to subparagraphs (ii), (iii), and (iv) of this paragraph, new development and redevelopment shall use best management practices, or other technologies, that reduce pollutant loading by 10% of the on-site level before the development or redevelopment.

(ii) If using best management practices for the development or redevelopment cannot achieve the 10% pollutant loading reduction either onsite or offsite, quantifiable offsets may be approved, if:

1. The benefits are obtained in the same watershed; and

2. The water quality benefits are equivalent to a 10% pollutant loading reduction.

(iii) 1. The Department of Environmental Protection and Resource Management may accept monetary compensation as an offset only if it is determined that the 10% pollution reduction requirement cannot be reasonably accomplished onsite or offsite.

2. Monetary compensation may not be used to avoid 10% pollutant loading reduction.

3. Monetary compensation shall be paid before the approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

(iv) The methodology to determine the 10% reduction in pollutant loadings and acceptable offsets shall conform to the standards and procedures under

the most recent guidance documents published by the Chesapeake Bay Critical Area Commission.

(2) Vegetation shall be established in permeable areas, if practicable, through landscaping and buffer planting.

(3) If possible, areas of public access to the shoreline shall be included in development and redevelopment plans.

(4) Development activity shall be designed and implemented to minimize the clearing of forest and developed woodland as:

(i) Delineated on the January, 1986 county forest and developed woodlands aerial photographs; or

(ii) Identified through a site inspection by the Department of Environmental Protection and Resource Management.

(c) Intensely Developed Areas Offset Fund.

(1) There is an Intensely Developed Areas Offset Fund under the Department of Environmental Protection and Resource Management.

(2) The Fund shall consist of:

(i) Monetary compensation paid under subsection (b)(1) of this section by an applicant who demonstrates to the Department of Environmental Protection and Resource Management that the applicant cannot meet the 10% pollutant loading reduction requirement;

(ii) Other monies that may be appropriated to the fund by the County Council; and

(iii) Interest accrued to the Fund.

(3) The Offset Fund may be used to implement:

(i) Water quality protection or restoration projects; or

(ii) Capital projects administered under the county's waterway improvement program.

(4) Monies credited and interest accrued to the Fund:

(i) Shall remain available until expended; and

(ii) May not revert to the general fund under any other provision of law.

(1988 Code, § 26-452) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-603. LIMITED DEVELOPMENT AREAS AND RESOURCE CONSERVATION AREA.

(a) Application. This section applies to development in limited development areas and resource conservation areas in the Chesapeake Bay Critical Area.

(b) General requirements.

(1) All development activity that crosses or affects a stream shall be designed to:

(i) Reduce increases in flood frequency and severity that are attributable to the development;

(ii) Retain tree canopy to maintain stream water temperature within normal variation;

(iii) Provide a natural substrate for streambeds; and

(iv) Minimize adverse water quality and quantity impacts from stormwater.

(2) Development plans shall incorporate a wildlife corridor system that connects the largest, most undeveloped or vegetated tracts of land within and adjacent to the site to provide a continuity of existing on-site and off-site plant and wildlife habitats.

(3) (i) The sum of all man-made impervious areas may not exceed 15% of the lot, parcel, or property proposed to be developed, except that:

1. If a one-half acre or less lot or parcel existed on or before December 1, 1985, man-made

impervious surfaces may not exceed 25% of the lot or parcel;

2. If a lot or parcel greater than one-half acre and less than one acre existed on or before December 1, 1985, man-made impervious surfaces may not exceed 15% of the lot or parcel; or

3. A. If a one acre or less individual lot is part of a subdivision approved after December 1, 1985, man-made impervious surfaces of the lot may not exceed 25% of the lot; and

B. The total of the impervious surfaces over the entire subdivision may not exceed 15%.

(ii) This paragraph does not apply to a trailer park that was in residential use on or before December 1, 1985.

(iii) The Director of Environmental Protection and Resource Management may allow a property owner to exceed the impervious surface limits under items (i)1. and 2. of this paragraph if:

1. New impervious surfaces on the property have been minimized;

2. A. For a one-half acre or less lot or parcel, total impervious surfaces do not exceed impervious surface limits in item (i)1. of this paragraph by more than the greater of 25% or 500 square feet; or

B. For a lot or parcel greater than one-half acre and less than one acre, total impervious surfaces do not exceed the greater of the impervious surface limits in item (i)2. of this paragraph or 5,445 square feet;

3. Water quality impacts associated with runoff from the new impervious surfaces have been minimized through site design considerations or use of best management practices approved by the

Department of Environmental Protection and Resource Management to improve water quality; and

4. The property owner:

A. Performs onsite mitigation as required by the Department of Environmental Protection and Resource Management to offset potential adverse water quality impacts from the new impervious surfaces; or

B. Pays monetary compensation into the county Water Quality Mitigation Fund instead of performing the onsite mitigation.

(iv) 1. The amount of the monetary compensation authorized under item (iii)4.B. of this subsection shall be established in accordance with § 3-1-202 of the Code.

2. Monetary compensation shall be paid before the approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

(v) 1. Notwithstanding any other provision of the Code, the Director of Environmental Protection and Resource Management may grant a variance from this paragraph in accordance with the Chesapeake Bay Critical Area criteria concerning:

A. Variances as part of local program development under COMAR 27.01.11; and

B. Notification of project applications under COMAR 27.03.01.

2. Notice of an applicant's variance proposal shall be published once in a newspaper of general circulation in the county 15 days before the variance may be approved.

3. The Director of Environmental Protection and Resource Management may require

conditions for variance approval, including site design conditions or mitigation, to minimize adverse impacts on water quality and fish, wildlife, or plant habitat.

4. A person aggrieved or feeling aggrieved by a decision of the Director of Environmental Protection and Resource Management made under this subparagraph may appeal the decision de novo to the Board of Appeals.

(4) A reduction in the road standards as established in the county standard specifications and details for construction may be allowed to reduce impacts from new development sites on Chesapeake Bay Critical Area resources, if the reduced standards do not significantly reduce safety.

(5) The stormwater management system shall be designed to:

(i) Prevent the development from causing downstream property, watercourses, channels, or conduits to receive stormwater runoff at a higher rate than would have resulted from a 10-year frequency storm if the land had remained in its predevelopment state;

(ii) Maximize the infiltration of water throughout the site, rather than concentrating flows into single discharge points;

(iii) Decentralize storm drain discharge points to simulate the predevelopment hydrologic regime; and

(iv) Ensure that sufficient storage capacity exists to:

1. Achieve water quality goals under the Chesapeake Bay Critical Area criteria; and

2. Eliminate all runoff caused by the development in excess of the amount that would have

come from the site if the land had remained in its predevelopment state.

(v) If an alternatives analysis submitted by the applicant clearly demonstrates that any or all of the requirements under this paragraph are infeasible due to site limitations, the Director of Environmental Protection and Resource Management may allow the implementation of alternative stormwater management measures, if equal or greater water quality benefits are achieved.

(c) Forests or developed woodland requirements.

(1) (i) A priority forest retention area as designated in the county Forest Protection and Establishment Manual shall be retained and protected to the extent possible.

(ii) 1. At a minimum, forests and developed woodlands containing nontidal wetlands, nontidal wetland buffers, buffers, or habitat protection areas shall be retained and protected in accordance with Subtitles 3, 4, and 5 of this title.

2. An applicant shall consider the recommendations of the State Department of Natural Resources when proposing to clear forests containing nontidal wetlands, nontidal wetland buffers, buffers, or habitat protection areas.

(2) (i) All clearing, or establishment through reforestation or afforestation, of a forest or developed woodland, as delineated on the January 1986 county forest and developed woodlands aerial photographs or identified through a site inspection by the Department of Environmental Protection and Resource Management, shall be done in accordance with a forest protection and establishment plan approved by the Department of Environmental Protection and Resource Management.

(ii) A forest protection and establishment plan shall be prepared by a licensed forester, a registered landscape architect, or a qualified professional who meets the requirements under COMAR 08.19.06.01.

(3) (i) 1. Except as provided in sub-subparagraph 3. of this subparagraph, no more than 20% of the sum of all forest and developed woodland may be cleared.

2. Except as provided in sub-subparagraph 3. of this subparagraph, every acre of forest and developed woodland cleared under this subparagraph shall be replaced by one acre of reforestation or afforestation.

3. An additional 10% of the forest or developed woodland may be cleared if every acre of forest or developed woodland cleared is replaced by one and one-half acres of reforestation or afforestation.

(ii) 1. If the configuration of the site precludes onsite replacement under subparagraph (i) of this paragraph, the applicant shall:

A. Secure an offsite area suitable for afforestation; and

B. Afforest the offsite area in compliance with subparagraph (i) of this paragraph.

2. If an appropriate offsite area cannot be located or secured, the county will allow the applicant to pay monetary compensation into the county forest protection and establishment fund instead of afforesting an offsite area.

(iii) 1. An applicant shall afforest to achieve 15% forest cover on a development site according to an approved forest protection and establishment plan, if:

A. No forest or developed woodland exists on the site; or

B. The site contains less than 15% forest cover.

2. If the configuration of the site precludes onsite replacement, the applicant shall secure an offsite area suitable for afforestation.

3. If an appropriate offsite area cannot be located or secured, the county will allow the applicant to pay monetary compensation into the county forest protection and establishment fund instead of afforesting an offsite area.

(iv) 1. Forest or developed woodland cleared shall be replaced in the Chesapeake Bay Critical Area to the extent possible.

2. All required afforestation and reforestation shall be directed to a priority forest retention area designated in the county Forest Protection and Establishment Manual to the extent possible.

(v) 1. A developer shall agree to:

A. Remove forest or developed woodland, reforest, or afforest according to an approved forest protection and establishment plan; or

B. Pay monetary compensation into the county Forest Protection and Establishment Fund.

2. The applicant shall pay required monetary compensation before the approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

3. A. If afforestation or reforestation is required, the applicant shall post a security in accordance with § 32-4-312 of the Code.

B. The security shall be posted before the approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

(vi) A person shall afforest or reforest an area under this title within the greater of one year or two growing seasons following approval of a project plan, a grading permit, or a building permit, as determined by the Department of Environmental Protection and Resource Management.

(d) Forest Protection and Establishment Fund.

(1) There is a Forest Protection and Establishment Fund in the Department of Environmental Protection and Resource Management.

(2) The Fund shall consist of:

(i) Monetary compensation paid under subsection (c) of this section by an applicant who demonstrates to the Department of Environmental Protection and Resource Management that the applicant cannot meet the afforestation and reforestation requirements;

(ii) Other monies appropriated to the fund by the County Council; and

(iii) Interest accrued to the Fund.

(3) (i) Subject to subparagraph (ii) of this paragraph, the Forest Protection and Establishment Fund may be used only for:

1. Reforestation and afforestation, including site preparation, planting, and maintenance; and

2. Implementing capital projects administered under the county's waterway improvement program.

(ii) Monetary compensation paid to the fund under paragraph (2)(i) of this subsection may be used only for forest replacement.

(4) Monies credited and interest accrued to the Fund:

(i) Shall remain available until expended; and

(ii) May not revert to the general fund under any other provision of law.

(1988 Code, § 26-453) (Bill No. 74, 1991, § 1; Bill No. 222, 1992, § 1; Bill No. 120-93, 1993, § 1; Bill No. 8-96, § 4, 3-23-1996; Bill No. 170-96, § 1, 2-1-1997; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-604. WATER-DEPENDANT ACTIVITY, FACILITY, OR STRUCTURE.

(a) Scope. This section applies to activity and structures that include water-dependent activity or structures associated with industrial, maritime, recreational, educational, or fishery activity.

(b) Buffer requirements. Siting, development, redevelopment, and expansion of water-dependent facilities in the buffer:

(1) Shall strictly conform to the criteria under the county water-dependent facilities manual;

(2) May be allowed in an intensely developed area or a limited development area if:

(i) Adverse effects to water quality, wintering and migrating waterfowl habitat, or fish, plant, and wildlife habitat are minimized;

(ii) Accessory structures are located outside the buffer; and

(iii) The activity meets a recognized private right or public need; and

(3) Are prohibited in a resource conservation area, except that community piers, public beaches, public water-oriented recreation or education areas,

public boat launching, public docking facilities, or fishing piers may be allowed if:

(i) Adequate sanitary facilities exist;

(ii) Service facilities other than pumps, lifts, and other similar facilities are located outside the buffer;

(iii) Permeable surfaces are used only if no groundwater degradation would result; and

(iv) Disturbance to natural vegetation is minimized.

(c) Marina requirements.

(1) A marina shall:

(i) Meet the sewage disposal sanitary requirements of the State Department of the Environment under COMAR 26.04.02; and

(ii) Minimize discharge of bottom-wash waters into tidal waters.

(2) New or expanded community marinas and other noncommercial boat docking and storage facilities may be allowed in an intensely developed area or a limited development area if:

(i) The facility does not offer food, fuel, or other goods and services for sale;

(ii) The facility is:

1. Community established and owned; and

2. Operated for the benefit of the residents of a platted and recorded riparian subdivision;

(iii) The disturbance to the buffer is the minimum necessary to provide a single point of access to the facility; and

(iv) The number of slips and piers is the lesser of:

1. A. One for each 50 feet of shoreline in the subdivision in an intensely developed area or a limited development area; and

B. One for each 300 feet of shoreline in the subdivision in a resource conservation area; or

2. For a subdivision with:

A. Up to 15 platted lots or dwellings, one for each lot;

B. 16 to 40 platted lots or dwellings, the greater of 15 or a number equal to 75% of the platted lots or dwellings;

C. 41 to 100 platted lots or dwellings, the greater of 30 or a number equal to 50% of the platted lots or dwellings;

D. 101 to 300 platted lots or dwellings, the greater of 50 or a number equal to 25% of the platted lots or dwellings; or

E. Over 300 platted lots or dwellings, the greater of 75 or a number equal to 15% of the platted lots or dwellings.

(3) If community piers or slips are provided as part of the new development, private piers in the development are prohibited.

(d) Other applicable law. In addition to this section, all new or expanded water-dependent facilities are subject to the requirements under:

(1) § 417 of the Baltimore County Zoning Regulations; and

(2) The County Water-Dependent Facilities Manual.

(1988 Code, § 26-454) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-605. STRUCTURES ON PRIVATE AND NONMARINA COMMERCIAL PROPERTY.

(a) Scope. This section applies to the construction, maintenance, repair, and expansion of fixed and floating piers, auxiliary structures, mooring piles, osprey poles, boat hoists and lifts, boathouses and nonwater-

dependent structures on private residential waterfront property and nonmarina commercial property.

(b) In general.

(1) (i) Subject to paragraph (2) of this subsection, only one pier, six moorings piles, two osprey poles, four boat hoists or lifts, and four boat slips are allowed per property.

(ii) New or expanded construction on nonmarina commercial property exceeding the limits under this paragraph are subject to the requirements for water-dependent facilities under § 33-2-604 of this subtitle.

(2) Piers, mooring piles, osprey poles, finger piers, boat hoists or lifts, decks, walkways, or other auxiliary structures are prohibited if the Director of Environmental Protection and Resource Management determines that the structure will:

(i) Adversely impact:

1. Shallow water habitat;
2. Submerged aquatic vegetation;
3. Vegetated nontidal wetlands or tidal wetlands;
4. Shellfish habitat;
5. Water quality; or
6. Habitat protection areas that contain endangered species, threatened species, species in need of conservation, anadromous fish propagation waters, colonial waterbird nesting habitat, or habitats of local significance;

(ii) Obstruct the ebb and flow of the tide;

(iii) Obstruct navigational channels or otherwise impede navigation;

(iv) Extend to within 100 feet of a ski course approved by the Department of Natural Resources; or

(v) Extend channelward of the lesser of the following:

1. 100 feet of the mean high-water line;

2. A distance 25 % of the width of the waterway; or

3. The minus three-foot contour.

(3) Except as provided in § 33-2-606 of this subtitle, other nonwater-dependent facilities and activities may not be constructed or installed in or over tidal wetlands.

(c) Boathouses.

(1) A boathouse or other similar temporary or permanent roof, cover, or raised deck, or associated support structures, may not be constructed or installed in or over tidal wetlands.

(2) Routine repair and maintenance of an existing boathouse is allowed if:

(i) There is no increase in width, length, height, or channelward encroachment of the structure; and

(ii) No enclosure of the structure occurs.

(d) Piers.

(1) (i) Except as provided in subparagraph (ii) of this paragraph, piers may be constructed in and over tidal wetlands and nontidal wetlands if the wetlands are not adversely impacted.

(ii) Unless no open water alternative exists, piers may not be constructed in and over tidal wetlands or nontidal wetlands that:

1. Are vegetated; or

2. Support a population of submerged aquatic vegetation.

(2) Piers shall be attached to uplands above the mean high-water line to minimize:

(i) Shading of vegetated wetlands; and

(ii) Disturbance to fish and wildlife habitat.

(3) (i) The width of the main section of a pier may not exceed 6 feet.

(ii) Piers shall be constructed a minimum of 3 feet above the top of the substrate of the wetlands, regardless of pier width.

(4) Heavy equipment used in pier construction shall be placed on mats or other suitable material to minimize damage to the wetlands.

(5) (i) A maximum of two 3-foot wide finger piers not exceeding 50% of the proposed slip length may be constructed on the landward side of the end of a private pier.

(ii) Finger piers may not be constructed on the channelward side of the end of a private pier.

(6) Petroleum dispensing apparatus may not be placed or stored on fixed or floating piers.

(e) Mooring piles. Mooring piles may not be installed in tidal wetlands and nontidal wetlands for boat mooring unless sufficient water depth allows mooring without:

(1) Alteration to the wetlands; or

(2) Disturbance to submerged aquatic vegetation or habitat protection areas.

(f) Auxiliary platforms.

(1) The total area of all fixed and floating auxiliary platforms, including "T's" and "L's" and step down platforms, may not exceed 200 square feet.

(2) Step down platforms and steps:

(i) May not, collectively, exceed 60 square feet; and

(ii) Shall be constructed on the landward side of the "T" or "L" head.

(3) Step down platforms and steps may not be constructed within the landward 50% of the main pier section.

(4) Fixed or floating auxiliary platforms may not be constructed over vegetated tidal wetlands or nontidal wetlands.

(5) Petroleum dispensing apparatus may not be placed or stored on a fixed or floating auxiliary platform.

(g) Project approval.

(1) The Department of Environmental Protection and Resource Management may require project approval conditions to minimize the adverse environmental impacts listed under items (b)(2)(i) and (ii) of this section.

(2) The Department of Environmental Protection and Resource Management may issue a letter of permission instead of a permit for the routine repair, replacement, and maintenance of an existing pier and auxiliary structure if, before work begins, the Department of Environmental Protection and Resource Management conducts a preliminary site inspection to verify the existing conditions and:

(i) Replacement does not expand or extend preexisting construction; and

(ii) Replacement does not relocate any portion of preexisting construction.

(h) Other applicable law; conflict of law.

(1) Structures subject to this section are also subject to the requirements of § 417 of the Baltimore County Zoning Regulations.

(2) In a conflict between this section and § 417 of the Baltimore County Zoning Regulations, the more restrictive provision shall prevail.

(i) Construction of section. This section may not be construed to authorize:

(1) Dredging or filling of tidal wetlands or nontidal wetlands, other than the installation of pilings;

(2) The installation or construction of shore erosion protection works; or

(3) The creation of a presumption that subsequent dredging or filling of tidal wetlands or nontidal wetlands will be authorized by the county or a state or federal agency.

(1988 Code, § 26-455) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-606. STRUCTURES ON PIER.

(a) "Pier" defined. In this section,"pier" includes a bulkhead, breakwater, piling, or similar structure.

(b) Scope. This section applies to the construction, installation, maintenance, repair, and expansion of structures on piers located in or over tidal wetlands.

(c) Prohibited. Except as provided in subsection (d) of this section, a person may not construct or install a dwelling unit, commercial building, sanitary facility, gazebo, shed, other storage building, roof, deck, or other temporary or permanent nonwater-dependent structure on a fixed or floating pier or auxiliary platform.

(d) Exceptions.

(1) A person may construct or install the structures listed in subsection (c) of this section on a fixed or floating pier or auxiliary platform if the pier:

(i) Existed on December 1, 1985; and

(ii) Is located in an intensely developed area.

(2) A temporary placement of a structure on a pier to facilitate construction of a bridge may be allowed if the Director of Environmental Protection and Resource Management determines that:

(i) There are no upland alternatives; and

(ii) All environmental impacts have been avoided or minimized.

(e) Maintenance. Routine maintenance and repair of an existing structure on a pier is allowed if:

(1) There is no increase in the width, length, or height of the structure; and

(2) No enclosure of the structure occurs.

(f) Requirements. All projects involving the construction, installation, maintenance, repair, or operation of a structure on a pier:

(1) May not have a long term adverse effect on the water quality of adjoining waters;

(2) Shall improve the water quality of existing stormwater runoff from the project site into adjoining waters; and

(3) May not allow a sewer line or other utility line extended for the pier to adversely affect the water quality of adjoining waters.

(g) Petroleum. Notwithstanding § 33-2-604 of this subtitle, a structure less than 100 square feet in area and with permanent vertical walls may be constructed on a pier at a commercial marina in an area that facilitates dispensing petroleum.

(h) Other law applicable. Structures subject to this section are also subject to the requirements of § 417 of the Baltimore County Zoning Regulations.

(1988 Code, § 26-456) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-607. SHORE EROSION PROTECTION MEASURES.

(a) Scope.

(1) This section applies to the construction and installation of shore erosion protection measures located above or below the mean high-water line.

(2) This section does not apply to structures constructed or installed under § 33-2-604 of this subtitle.

(b) Structural shore erosion protection measures.

(1) Except as provided in paragraph (2) of this subsection, structural shore erosion protection measures may not be constructed or installed.

(2) Structural shore erosion protection measures may be constructed or installed in:

(i) A significantly eroding area; or

(ii) Other areas where nonstructural shore erosion protection measures cannot practically and effectively reduce or prevent shore erosion.

(c) Nonstructural shore erosion protection measures. Nonstructural shore erosion protection measures shall be used in all other areas where shore erosion is to be controlled.

(d) Requirements.

(1) In areas where structural shore erosion protection measures are allowed, the measure that shall be used is the measure that:

(i) Best provides for the protection of plant, fish, and wildlife habitat; and

(ii) Practically and effectively reduces or prevents shore erosion.

(2) (i) 1. Individual trees may be removed from the buffer to allow construction access or installation of shore erosion protection measures.

2. Each tree cut under this subparagraph shall be replaced in the buffer on an equal basis.

(ii) 1. Disturbance to other naturally vegetated areas in the buffer shall be minimized.

2. Stabilization or revegetation of disturbed vegetated areas may be required when

construction of the shore erosion protection measures is complete.

(3) Structural shore erosion protection measures may not be constructed or installed if the measures will adversely impact:

(i) Shallow water habitat;

(ii) Submerged aquatic vegetation;

(iii) Shellfish habitat;

(iv) Water quality;

(v) Anadromous fish propagation waters; or

(vi) Endangered species, threatened species, or species in need of conservation.

(e) Project approval. The Director of Environmental Protection and Resource Management may require project approval conditions to minimize adverse environmental impacts associated with the construction and installation of structural shore erosion protection measures.

(f) Other applicable law. Structures subject to this section are also subject to the requirements of § 417 of the Baltimore County Zoning Regulations.

(1988 Code, § 26-457) (Bill No. 8-96, § 4, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 7. FORESTS

§ 33-2-701. FORESTRY.

(a) In general. Forestry and the cutting or clearing of forest or developed woodland, including the clearing of trees in the buffer, are subject to §§ 33-2-405 and 33-2-603(c) and (d) of this title.

(b) Minimal clearing. The cutting or clearing of forest and developed woodland for which a forest management plan is not required is subject to § 33-2-603(c) and (d) of this title.

(1988 Code, §§ 14-260, 14-264) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-702. SEDIMENT CONTROL PLAN.

(a) Required for certain timber harvests. A Sediment Control Plan under § 33-5-104 of this article is required for all tree harvesting, including harvesting on agricultural land, that would disturb more than 5,000 square feet of surface area in one year.

(b) Forest management plan. If the Sediment Control Plan affects a total of more than one acre of forest or developed woodland, the plan shall be accompanied by a Forest Management Plan approved by the Department of Environmental Protection and Resource Management, the forestry programs of the State Department of Natural Resources, and the County Forest Conservancy District Board.

(c) Approval. A Sediment Control Plan shall be submitted and approved under § 33-5-104 of this article.

(1988 Code, § 14-264) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 8. NAVIGABLE WATERS

§ 33-2-801. WORK IN NAVIGABLE WATERS BELOW TIDE.

(a) Permit required. A person may not drive a pile, erect a platform, or conduct filling, construction, repairs, alterations, removals, dredging, demolitions, or other work of any kind in the navigable waters of the county below mean tide without a written permit from the County Building Engineer and approval of the Director of Environmental Protection and Resource Management or the Director's designee.

(b) Penalty. A person who violates this section is guilty of a misdemeanor.

(1988 Code, § 14-1) (Bill No. 94-02, § 2, 7-1-2004)

§ 33-2-802. WATERWAY IMPROVEMENT FUND - SPUR DREDGING.

(a) Loans authorized. A residential property owner abutting a channel adjacent to a main channel or harbor whose property has been included in a waterway improvement district by the county may apply for an interest-free loan to dredge the adjacent channel or spur.

(b) General terms.

(1) The property owner shall certify the cost of the dredging to the Director of Budget and Finance.

(2) The assessment under subsection (c) of this section shall constitute a lien on the property until the loan is repaid.

(c) Repayment.

(1) (i) On application, the county may provide for the repayment of a loan under this section in up to 10 annual installments.

(ii) Installment payments are not allowed unless under an agreement between the property owners and the county before performance of the work.

(2) The Director of Budget and Finance may add one-tenth of a spur dredging assessment with no interest to the tax bill for the property for each of the next succeeding 10 years.

(3) The Director of Budget and Finance shall collect the assessment in the same manner and at the same time as state and county taxes are collected.

(4) The property owner may accelerate the payments without penalty or discount.

(5) If the property owner sells or conveys the property, the total charges then due shall be paid in full.

(1988 Code, § 14-258) (Bill No. 10-96, § 2, 3-23-1996; Bill No. 49-96, § 6, 7-1-1996; Bill No. 94-02, § 2, 7-1-2004)

SUBTITLE 9. ENFORCEMENT; REMEDIES

§ 33-2-901. ENFORCEMENT.

(a) In general. For the proper implementation and enforcement of this title, the Director of Environmental Protection and Resource Management may:

(1) Adopt and amend appropriate regulations in accordance with Article 3, Title 7 of the Code, that are consistent with this title; and

(2) Enforce the regulations and this title in accordance with the procedures under this section.

(b) Correction notice. The Director may enforce the provisions of this title in accordance with Article 3, Title 6 of the Code.

(c) Revocation or suspension of approval or permit. The county may revoke or suspend any approval or permit issued by the county after written notice to the permittee for the following reasons:

(1) Any violation of the conditions of the permit or approved plans;

(2) Construction, grading, timber harvesting, tree cutting, clearing, or grubbing that is not in accordance with the approved plans;

(3) Noncompliance with a correction notice or stop-work order;

(4) Changes in site characteristics upon which plan approvals and permit issuance were based; or

(5) Any violation of this title or any regulations adopted under this title.

(d) Public notice of violations.

(1) In this subsection, "significant violation" means a violation that:

(i) Remains uncorrected 45 days after notification of noncompliance;

(ii) Is part of a pattern of noncompliance over a 12-month period; or

(iii) Involves a failure to accurately report noncompliance.

(2) The Director shall annually publish in the largest daily newspaper published in the county a list of persons who commit a significant violation of this title during the previous 12 months.

(3) The notice under this subsection also shall summarize any enforcement actions taken against the person who commits a significant violation during the 12-month period.

(1988 Code, § 26-459) (Bill No. 50, 1993, § 2, 7-10-1993; Bill No. 94-02, § 2, 7-1-2004; Bill No. 82-06, § 3, 8-24-2006)

§ 33-2-902. CIVIL PENALTIES.

In assessing an appropriate civil penalty under this title, the Director shall give due consideration to:

(1) The size of the business of the person charged;

(2) The gravity of the violation;

(3) The good faith of the person charged; and

(4) The person's history of previous violations.

(1988 Code, §§ 14-266, 26-460) (Bill No. 172, 1989, § 2; Bill No. 106, 1990, § 1; Bill No. 61-95, § 1, 6-30-1995; Bill No. 8-96, § 4, 3-23-1996; Bill No. 49-96, § 15, 7-1-1996; Bill No. 51-99, § 1, 8-26-1999; Bill No. 94-02, § 2, 7-1-2004; Bill No. 82-06, § 3, 8-24-2006)

§ 33-2-903. INJUNCTION.

A person whose approval is required under this title may seek an injunction against a person who violates this title.

(Bill No. 82-06, § 4, 8-24-2006)

§ 33-2-904. CRIMINAL PENALTIES.

(a) In general. A person who violates this title, or a regulation, order, or permit condition adopted or issued under this title, is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding $1,000 or both.

(b) Separate offenses. Each day a violation occurs is a separate offense.

(1988 Code, §§ 14-266, 26-462) (Bill No. 172, 1989, § 2; Bill No. 106, 1990, § 1; Bill No. 61-95, § 1, 6-30-1995; Bill No. 8-96, § 4, 3-23-1996; Bill No. 51-99, § 1, 8-26-1999; Bill No. 94-02, § 2, 7-1-2004; Bill No. 82-06, § 3, 8-24-2006)

§ 33-2-905. LIABILITY FOR EXPENSES CAUSED BY VIOLATION.

A person who violates this title, or a regulation adopted under this title, is liable for any costs incurred by the county as a result of the violation.

Baltimore County Zoning Regulations Section 105, Prohibited Uses in Chesapeake Bay Critical Area [Bill No. 32-1988]

The establishment or expansion of the following uses is prohibited in all Chesapeake Bay Critical Areas:

A. Solid or hazardous waste collection or disposal facilities.

B. Sanitary landfills.

C. Liquefied natural gas facility. [Bill No. 9-2007EN(1)]

D. Permanent sludge hauling, storage, or disposal facilities other than those associated with wastewater treatment facilities.

E. Transportation facilities and utility transmission facilities, except those necessary to serve uses permitted in the underlying zone per the Baltimore County Zoning Regulations. Such uses may be

permitted only in intensely developed areas and only after the activity or facility has demonstrated that there will be a net improvement in water quality to the adjacent body of water. [Bill No. 9-1996]

F. Nonmaritime heavy industries, except those uses permitted in the underlying zone as authorized by these regulations. Such uses may be permitted only in intensely developed areas, as defined by the Baltimore County Code, EN(2) and only after the activity or facility has demonstrated that there will be a net improvement in water quality to the adjacent body of water. [Bill No. 9-1996]

Endnotes

1 (Popup)

Editor's Note: This bill also provided for the redesignation of former Subsections C, D and E as D, E and F, respectively.

2 (Popup)

Editor's Note: See § 33-2-101 of the Baltimore County Code, 2003.

3 (Popup)

Editor's Note: Bill No. 98-1975, which enacted this Article, also repealed former Article IA, Sections 1A00 and 1A01, previously added by Bill No. 100-1970.